UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1941.

No. 3796.

CARLOS M. DE CASTRO,

PETITIONER, APPELLANT,

v.

BOARD OF COMMISSIONERS OF SAN JUAN,

RESPONDENT, APPELLEE.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO.
JUDGMENT, JANUARY 14, 1942.

TRANSCRIPT OF RECORD.

HUGH R. FRANCIS,
GABRIEL DE LA HABA,
for Appellant.

F. FERNANDEZ CUYAR,
for Appellee.

BOSTON:
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1942

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BOARD OF COMMISSIONERS OF SAN JUAN,
RESPONDENT, APPELLEE.

TRANSCRIPT OF RECORD.

[FILED IN CIRCUIT COURT OF APPEALS BY LEAVE OF COURT JULY 17, 1942.]

IN THE SUPREME COURT OF PUERTO RICO.

No. 8070.

CARLOS M. DE CASTRO, Petitioner and Appellant,

v.

BOARD OF COMMISSIONERS OF SAN JUAN, Defendant and Appellee.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN.
CERTIORARI.

OPINION OF THE COURT

DELIVERED BY MR. JUSTICE WOLF.

San Juan, Puerto Rico, June 28, 1940.

Pedro Ramirez Nadal preferred charges against Carlos M. de Castro, city manager of the capital, before the Board of Commis-

sioners of the Government of the capital. On November 10, 1938, the Board made the charges its own and impeached the city manager. The city manager was duly notified and answered. A public hearing began on November 21, 1938, and lasted several sessions. On January 5, 1939, the city manager was suspended from office. The hearing continued until February 17th. On April 5 the city manager was removed from office.

Nineteen charges were made against the city manager. They were numbered V to XXIII. The paragraphs from I to IV were devoted to the introductory statements of the charges. Evidence was offered on seven of these. So that the trial was begun nominally on all 19 charges. The manager went to trial, it may be presumed, at the beginning without any specific knowledge of which charges were to be presented. We say this now for various reasons, one of which is that the appellant in this court maintains that none of the charges as preferred was the sufficient statement of a charge of removal for just cause. The appellee, on the other hand, maintains that all the charges were sufficiently specific and that the defendant needed no further notice. If any one of the 19 charges was sufficient to justify the removal of the city manager, then great care should have been taken in its composition. If, on the other hand, the charges are to be considered together, it is quite a question whether or not the court below might not have considered the charges together to see whether there was enough in all of them to justify the removal. We had a serious doubt as to whether the principal charge on which the appellee and the court below relied, as to the alleged disastrous condition of the aqueduct of San Juan, was the just cause to which the law refers. We shall revert now to the four charges that were finally presented to the District Court of San Juan.

Charge No. X says:

> "On or about November 24, 1937, one Jose Torres Silva, an employee of the Government of the Capital, when completely intoxicated, fired two revolver shots in the paymaster's

office of the Municipal Building while he was on duty, and the fact came to be known by the aforesaid Carlos M. de Castro and he took no action in regard to said acts of Mr. Torres Silva."

The Board found:

"Whereas it appears from the testimony of the witness presented both on behalf of the prosecution and of the defendant, and especially the statements of the City Manager and Jose Torres Silva, that the imputation contained in the Xth paragraph of the complaint constitutes negligence on the part of the City Manager, and that his attitude is far from being the 'good conduct' of which the Organic Act of this Government speaks, and on the contrary, the attitude and words of the City Manager in relation to that incident clearly constitutes 'immoral or incorrect conduct' as determined in that law."

Charge No. XII says:

"On or about October 2, 1937, in the matter of an accident suffered by automobile GM201, property of the Capital, caused by the negligence of Jose Marcos Morales, an employee of the Government of the Capital, as had been decided by the Auditor of the Capital, the aforesaid Carlos M. de Castro, in his position as City Manager, required the Auditor of the Capital personally and through the School Director, to file away the case, although he knew that such a filing would be illegal and against the interest of the Capital. Said Jose Marcos Morales was an employee under the direct charge of the aforesaid Carlos M. de Castro in his capacity as City Manager.

"In this case Carlos M. de Castro, in his aforesaid capacity and in his office in the City Hall, threatened and tried to frighten said Auditor, so that he would compromise said case, all of it against the interests of the Capital."

The Board said:

"Whereas it appears from the testimony of witnesses that the conduct of the City Manager in the specific incident to which paragraph XII of the List of Charges refers, and which is contained therein, is in every way not the 'good conduct' determined by the act creating this Government of the Capital, and on the contrary, the actions of the City Manager constitute a violation of the duties imposed by the statute on the City Manager and are included in the phrase 'immoral or incorrect conduct' determined by the aforesaid act."

Charge No. XXII says:

"The aforesaid Carlos M. de Castro, in his stated capacity, has not taken the necessary steps to enforce the ordinances of the Government of the Capital, to wit:

"1. Ordinance No. 249, as amended. 2. Ordinance No. 360; 3. Ordinance No. 364; 4. Ordinance No. 367; 5. Ordinance No. 369; 6. Ordinance No. 371; 7. Ordinance No. 380; 8. Ordinance No. 385; 9. Ordinance No. 393; 10. Ordinance No. 394; and various other of the ordinances of the Capital."

The Board said:

"Whereas it has been fully shown by the documentary evidence offered, by the testimony of the Secretary of the City Manager himself, that he, voluntarily, purposely, systematically and negligently failed to enforce, without any moral or legal excuse, knowingly and ignoring the express orders of this Board, the duties and obligations imposed upon him by Ordinances Nos. 360, 367, 371 of this Board, adopting therefore an attitude contrary to the good conduct prescribed by the Act of the Government of the Capital or incurring in the 'immoral or incorrect conduct' determined by that law."

Charge No. 6 says:

"The aforesaid Carlos M. de Castro in the discharge of his

duties as City Manager has not inspected nor managed the aqueduct system of the Capital which supplies water to the Capital and to the municipalities of Bayamon and Catano and in part to the municipality of Rio Piedras, nor does so at present. Said Carlos M. de Castro has allowed and allows in his said capacity, that the equipment of said system, including dams, filter plants, mains, valves and other apparatus should fall into a state of carelessness and disorder. He has allowed and allows the water supplied by said system and consumed by the stated municipalities to be contaminated in such a way that it has menaced and menaces public health and welfare.

"Due to that state of carelessness and disorder, the supply of water has been interrupted at various times and there is the menacing possibility that said supply may be interrupted at any moment.

"Due to such disorder in the management of the water supply system, the Capital is unable to collect and does not collect payment for the water served to many consumers, and Carlos M. de Castro has allowed and allows that many consumers have used and use the water service without paying for said service."

The Board said:

"Whereas the documentary evidence offered, not only to support the complaint, but on behalf of the defendant, and the testimony of witnesses and experts offered to support the charge contained in the 6th paragraph of the complaint, including the evidence of the same nature offered by the defendant, show beyond shadow of doubt that the City Manager incurred in negligence and adopted an attitude highly prejudicial to the interests of the community of this capital, not paying attention and on the contrary ignoring the repeated observations made to him orally and in writing by the authorities of the Insular Department of Health in relation

to the contamination of the water for public consumption; in not paying attention to the repeated observations and requests made to him by various employees of this Government of the Capital itself in that regard, in all thereby showing he has not observed the good conduct to which the law creating the Government of the Capital refers, and incurring in neglect and 'in 'immoral and incorrect conduct'; and—Whereas this Board understand that because of the reasons, statements and facts hereinbefore expressed and recited, there exists just cause for removing the City Manager because of carelessness, inexcusable negligence and immoral and incorrect conduct in the discharge of his office. . . ."

On April 11, 1939, the city manager asked the District Court of San Juan for a writ of certiorari which issued. A hearing was held on June 1, 1939. Judgment was rendered on August 21, 1939, quashing the writ. The defendant of course assigns various errors which we find it unnecessary to discuss in any particular order.

In point of fact a large part of the discussion in the court below and in the briefs of the appellant was that section 22 of Act No. 99 of 1931 (Session Laws, pp. 626, 639), only permitted the presentation of charges for felonies or misdemeanors. It reads in Spanish as follows:

"El Administrador de la Capital podrá ser destituído por la Junta de Comisionados por justa causa, previa audiencia y oportunidad para defenderse por sí o mediante abogados. Serán causas para destituir al Administrador de la Capital: cualquier acto realizado por él que constituya un delito grave (*felony*); cualquier acto realizado por él fue constituya un delito menos grave (*misdemeanor*) y que implique depravación moral, abandono, negligencia inexcusable en el desempeño de su cargo, o conducta inmoral e incorrecta en el desempeño del mismo."

As the statute was enacted in Spanish the Spanish text should prevail. The English text is as follows:

"The City Manager may be removed by the Board of Commissioners, for just cause, upon hearing and an opportunity to defend himself either in person or through attorneys. The following shall be causes for the removal of the City Manager: Any act of his constituting a felony; any act of his constituting a misdemeanor and implying moral turpitude; or carelessness, inexcusable negligence in the performance of his duties, or immoral or incorrect conduct in the exercise thereof."

The court below held that besides crimes and misdemeanors the mayor might be impeached for grave negligence in the discharge of his duties. The effect of the court's decision was to follow the literal words of the English text rather than of the Spanish, but we agree that it must have been the intention of the Legislature that grave negligence should also be a cause for removal. This was the way both texts read for the review by certiorari of a subordinate officer's removability under previous acts. In the Spanish text we think the word "*y*" after the word "*misdemeanor*" should be read as "*o*" because any other interpretation of the Act would lead to an absurdity.

These conclusions are borne out by section 21 of Act No. 99 which is as follows:

"The City Manager shall be the chief executive of the Capital; he shall be appointed by the Board of Commissioners created by this Act and shall hold office during good conduct."

We need not stress the point too much, because assuming the correctness of our conclusion and that of the court below the case should be reversed on other grounds.

The court held that charges X and XII had not been proved. We find no reason to challenge the correctness of this decision, especially as the appellee does not do so.

When it came to charges XXII and VI the court held that the evidence was contradictory and that therefore the findings of the

Board were conclusive. Reliance was placed on the following cases. *Coll* v. *Todd*, 35 P.R.R. 572; *Rivera* v. *Asamblea Municipal*, 39 P.R.R. 71; *Fernandez* v. *Pavia*, 42 P.R.R. 740, and *Valldejuli* v. *De Castro*, 52 P.R.R. 275. We may interpose here that we are not at all convinced that the situation created by Act No. 99 for the removal of a city manager is identical or even similar to the right of the head of a department to remove one of his subordinates. However this may be the fact remains that in all of these cases the reader would have had some idea from the opinion of the essential nature of the charges against the petitioner therein.

From the briefs of neither of the parties do we have a clear idea of what the mayor failed to do or what he ought to have done with respect to the aqueduct. It is obvious that the rule for the removal of subordinates should be different because the mayor has a responsibility for his employees. There is no relation of employer and employee between the Municipal Assembly and the city manager. When a city manager is about to be removed, the Municipal Assembly ought to make the just cause for which he was to be removed specifically clearer than was done in this case.

Charge No. XXII relates to the failure of the city manager to put into force certain ordinances. We shall not attempt to recite them. The court held that the evidence was contradictory. We have examined the evidence and we do not find that the failure to put into effect some of these ordinances was anything more than perhaps an abuse of discretion or a difference in opinion as to the merits of the ordinances, and were not the just cause to which the statute relates.

The really important charge in this case was the one that related to the aqueduct. In our opinion all the other charges were negligible. It may be said, however, that if the charge against the mayor had originally been solely for his conduct in regard to the administration of the aqueduct, he might have come before the Municipal Assembly better prepared to defend his case. As we

have intimated before, we have no idea at the present writing exactly what the mayor should have done that he did not do.

There was a long trial. A number of prominent citizens were assemblymen and took part in the trial of the city manager, but we did not find anything in the record on the part of them to show any great activity with respect to the conduct of the aqueduct. They might be held to share some of the responsibility. We find nothing in the brief of the appellee and practically nothing in the typewritten evidence certified up to us that would specifically indicate to us what the mayor ought to have done under the circumstances of this case. Evidence of what previous mayors had done was, as we read it, excluded when the mayor attempted to offer evidence of that kind. Enough we find to show that when the mayor took charge of the city government the aqueduct was already in a troublesome condition.

From some of the evidence it definitely appeared that if the City of San Juan could have relied alone on the water that came from Guaynabo there would have been no great difficuty. However, the fact remained that the city before the advent of Mr. de Castro had used for a necessary supply the waters that came from Rio Piedras. Now this volume of water was to a certain extent contaminated with coli-bacilli. It sufficiently appeared from the evidence that previous mayors and Dr. de Castro, on the advice of their own engineers, felt bound to use both sources of supply to furnish the city of San Juan with the necessary water. One of the declarations we found in the evidence showed that ships in the Island were not using the water of the aqueduct, but a subsequent bit of testimony was that they were using it at the time of the hearing.

Meanwhile also San Juan was very well supplied with water and no pestilences or other great harm have happened to the population by reason of the condition of its water supply.

During the time that Mr. de Castro was mayor the population of the City of San Juan increased not only by natural growth and flowing from all parts of the Island, but the PRERA, the PRRA

and other Federal agencies caused an increase of population as well as an increase of that kind of construction where water would be used in greater volume.

The mayor by his testimony showed that he had become aware of the difficult situation and he was attempting to remedy it. He hoped and tried for greater funds but could not get them. Nevertheless he obtained some and attempted to relieve the demand by an increase of water supply.

We have examined the evidence despite the failure of the appellee to sum it up for us and we can not find or hold that the actions of the mayor, so far as demonstrated to us, with regard to the condition of the aqueduct were the just cause for his removal. The mayor had a responsibilty for all the works of the important municipality of San Juan. We are not pretending to say that he could not have done more to improve the condition of the aqueduct, but the appellee has not pointed out the way.

On the theory that the district court could not examine the supposed conflicting evidence because the appellee was the sole judge thereof, the latter says that it should not attempt to discuss the 600 pages of evidence. As we have said before, the specific charges against the mayor with respect to the aqueduct do not stand out as being the just cause to which the statute refers. Given the strict attitude of the appellant toward the consruction of section 22 of Act No. 99, we are not totally surprised that the court should have felt itself bound to take a similar strict attitude with respect to the kind of removals which it had a right to review, namely, infractions of the Constitution, the Organic Act or the laws of Puerto Rico. We, however, think that if there is a strong doubt as to the sufficiency of the charges the law is and should be that a mayor ought not to be removed. To hold otherwise is against the law.

While we hold that the mayor might be removed for grave negligence, we feel also bound to hold that the evidence of such grave negligence ought to be somewhat similar to that required for a crime, felony, or a misdemeanor. *Noscitur a scociis.* However, even if the charge with respect to the aqueduct had been a

little graver than it appears, given all the precedents with respect to the aqueduct, we do not think standing alone it was a just cause for the removal of the city manager. This is one of the principal reasons for not agreeing with the court below. We likewise have a serious doubt whether the charges were sufficiently specific and whether the court below did not have a right to say so.

The judgment appealed from must be reversed, and in its stead a new one rendered, annulling Ordinances No. 370 of January 5, 1939, and No. 373, of April 5, 1939, which decree the suspension and removal of the city manager, and in consequence thereof ordering the reinstatement of the petitioner Carlos M. de Castro in his office of city manager, said reinstatement to date back from January 5, 1939, when the petitioner was suspended from office and pay.

ADOLPH G. WOLF,
Associate Justice.

[Same Title.]

JUDGMENT.

San Juan, Puerto Rico, June 28, 1940.

For the reasons set forth in the foregoing opinion, the judgment appealed from, which was rendered by the District Court of San Juan on August 21, 1939, is hereby reversed, and in its stead a new one rendered, annulling Ordinances No. 370, of January 5, 1939, and No. 373, of April 5, 1939, which decreed the suspension and removal of the city manager, and in consequence thereof, ordering the reinstatement of the petitioner Carlos M. de Castro in his office of city manager, said reinstatement to date back from January 5, 1939, when the petitioner was suspended from office and pay.

It was so ordered by the court as witness the signature of the Chief Justice.

EMILIO DEL TORO,
Chief Justice.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[Same Title.]

MOTION TO STAY THE EXECUTION OF THE JUDGMENT INSOFAR AS IT ORDERS THE REINSTATEMENT OF PETITIONER IN THE OFFICE OF CITY MANAGER OF THE CAPITAL.

[Filed October 27, 1941.]

Now comes the Board of Commissioners of San Juan, respondent and appellee in these proceedings, through its undersigned attorneys, and to this Honorable Court respectfully states and requests:

1. That on June 28, 1940, this court rendered judgment in the instant case reversing the one rendered by the District Court of San Juan and thus annulling certain resolutions adopted by the respondent which decreed the suspension and removal of petitioner from the office of city manager of the capital. The judgment of this court also ordered the reinstatement of petitioner Carlos M. de Castro in the office of city manager of the capital.

2. The aforementioned judgment was appealed from to the United States Circuit Court of Appeals for the First Circuit which dismissed the appeal and the Supreme Court of the United States afterwards denied the petition for certiorari filed by this party to review the judgment rendered by the Circuit Court for the First Circuit. The mandate of the judgment rendered by the Supreme Court of the United States is at present in the hands of the clerk of this court, for which reason this Honorable Court has full jurisdiction once more over the instant proceedings.

3. Respondent alleges that although the judgment rendered on June 28, 1940, insofar as it ordered the reinstatement of petitioner in the office of city manager of the capital, was fully justified in view of the findings of facts and of law to which the court arrived in its opinion, the part of said judgment which orders petitioner's reinstatement should not be executed and such reinstatement should not be decreed for the simple reason that the term

during which petitioner should hold the office of city manager of the capital has already expired, and said petitioner has no legal right whatsoever to hold said office again, since his tenure expired in January, 1941, when a new Board of Commissioners was elected by the voters of this municipality and when said new Board exercised the faculty granted to it by law of electing the city manager of the capital.

4. Act No. 99 of 1931, creating the new Government of the capital, as it has been subsequently amended, provides that said government shall be composed of the Board of Commissioners of San Juan and the city manager of the capital, the treasurer, the director of public works, the director of health and charities, the school director, the auditor and the secretary of the capital, the statute failing to fix any definite term for any of the executive offices, but fixing such tenure for the Commissioners who compose the Board of Commissioners of San Juan. The majority of the members of this Board (five) is elected every four years and thus the term of office of the appointing power which designates the city manager is definite and fixed, the theory that the tenure of office of the city manager is in excess of four years not being consequently in harmony with the statute.

> "If no definite term is fixed, the office is held *for the term of the appointing power*, or at the will of the authority which conferred it provided the term so conferred does not extend beyond that of the appointing power." 43 C.J. 642, Sec. 1058.

Section 39 of the aforementioned act expressly provides that all the appointments of employees shall be made by the respective officers and that such employees shall be appointed *"for the term for which each officer is appointed"*, and it is obvious that the statute must be construed in the sense that the tenure of office of each and every one of the employees and officers is not perpetual and eternal, for life, but for four years, such as is the tenure of the appointing power who selects them. It would be

absurd to construe the statute in the sense that all the officers and employees of the Government of the capital, once appointed, shall hold their offices for life. Such construction would be unreasonable, contrary to the legislative intention and manifestly antidemocratic. It would be antidemocratic since, bearing in mind that the law provides that every four years the voters of the municipality shall elect their Commissioners or city manager, it is not in harmony with democratic practices that the municipal administration, whose existence, according to law, cannot exceed four years, shall be able to appoint employees for a term longer than the one for which it is elected and because if it has been the legislature's intention that every four years the voters should designate the Commissioners who are to be intrusted with the municipal administration and who according to section 21 of the statute shall appoint a city manager, giving thus an opportunity for other political or economic ideas to prevail, it is not conceivable that it should be possible to compel these new Commissioners to develop their political or economic plans with employees or officers unwilling to support them due to their contrary views. The statute allows certain political or economic ideas to prevail in the polls and it must also be understood that it permits its consequences. If it were to be held that all the officers and employees of the Government of the capital hold their employments for life, such a thing would have the effect of creating for their benefit a right which the legislature denied them when it excluded them from the classified Civil Service right, which, according to such interpretation, would be acknowledged them merely by their appointment and without proving the requisites of competence demanded from those within the Civil Service.

It is true that section 21 of the statute provides that the city manager shall be appointed by the Board of Commissioners and shall hold his office "during good conduct", but such provision must be understood in the sense that it binds the city manager, under threat of removal, to observe good behavior during his tenure of four years. It has thus been construed by the trend of

decisions. See *Woolley* v. *Frock*, 105 Atl. 489, wherein the facts and the issues joined were almost identical to those of the case at bar, and where the following conclusion was arrived at:

> "We are of opinion that the relator's term was fixed by the statute for the life of the board: that is to say, for four years."

Further on in the opinion rendered in the above cited case, the court considers the different sections of the law which provide for the election of the Commissioners and for the appointment of the mayor by the Commissioners once the latter have been elected, the statute failing to provide any term of office for the mayor but providing a tenure of four years for the Commissioners, and providing further that the mayor and any other officer might be removed for cause, after a hearing, etc.

The court then expressed itself as follows:

> "Here there is a positive injunction that the presiding officer must be chosen 'at the first meeting after their election'. This positive injunction applies when each new board assumes its official duties. This occurs of necessity at intervals of four years. It is the initial act of organization of each new board. At such initial meeting the commissioners are directed to make the choice. We may paraphrase thus what was said in *Smith* v. *Reagan*: 'From this it necessarily follows that, as the meetings (for the purpose now considered) are to occur at intervals of four years, the term of office is limited to the period of time between them, and is, therefore, fixed by law, within the meaning of the act, for the term of four years.' "

On this point, the doctrine stated in the cases of *Burgan* v. *Civil Service Commission*, 86 Atl. 929, and *Smith* v. *Reagan*, 23 Atl. 1012, among others, may be examined.

It is not conceivable to construe the statute in the sense that all the officers and employees of the Government of the capital hold

their offices and employments for life, as such construction would bring about a complete revolution in the general tenure of office and it would involve a radical alteration in the universal practice of government of not appointing officers or employees for life. See immediately following how the Supreme Court of the United States refuses to construe statutes in such a sense:

> "To construe the statute as contended for by appellant is to give an appraiser of merchandise the right to hold that office during his life, or until he shall be found guilty of some act specified in the statute. If this be true, a complete revolution in the general tenure of office is effected, by implication, with regard to this particular office. We think it quite inadmissible to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. The rule which is expressed in the maxim is a very proper one and founded upon justifiable reasoning in many instances, but should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century, and the consequent curtailment of the powers of the executive in such an unusual manner." *Shurtleff* v. *United States*, 47 L. ed. 828, at page 832, 189 U.S. 311.

This Honorable Court takes judicial notice of the fact that, since the approval of Act No. 99 of 1931, creating the new Government of the capital, not only all government officers, but likewise, petitioner Carlos M. de Castro himself, have construed the statute in the sense that the tenure of office of the city manager is of four years. The first city manager elected by the first Board of Commissioners was Mr. Benitez Castano, and already in the elections of the year 1936, Carlos M. de Castro himself took active part in the political campaign, appearing as a candidate for city manager in opposition to candidates for the same office sup-

ported by other political parties, and the petitioner secured his appointment of city manager due to the fact that the Board of Commissioners was elected by the party to which petitioner belonged and in whose ticket he appeared as a candidate for city manager. In 1940, all the political parties presented their respective candidates for the office of city manager in the understanding, of course, that the Commissioners proposed by said political parties should be elected.

In other words, since the approval of Act No. 99 of 1931, until the present, all government officers, political parties, the different city managers and petitioner himself have construed said statute in the sense that the office of city manager has a four year tenure. And it should be also observed that the Legislature of Puerto Rico, notwithstanding that it knew this construction, has not amended the statute, thus showing that the prevailing construction is the correct one:

> "It is a rule of construction that, if a statute is of doubtful import, a court will consider the construction put upon the act when it first came into operation and that construction, after lapse of time, without change either by the legislature or judicial decision, will be regarded as the correct construction.
>
> "So also, the practical construction given to a statute by public officials and acted upon by the people, is not only to be considered, but in cases of doubt will be regarded as decisive. It is allowed the same effect as a course of judicial decision. The legislature is presumed to be cognizant of such construction, and when long continued, in absence of legislation evincing a dissent, the courts will adopt that construction.
>
> "....
>
> "Plaintiff in error accepted his appointment presumably with knowledge of the limitation affixed to his tenure by the construction referred to. He therefore took subject to that construction and cannot now be permitted to insist upon a different construction." *Smith* v. *Byron*, 40 S.E. 654.

"When the legislature has silently acquiesced in administrative construction of a statute by failing to amend it, such construction is accepted generally by the courts as persuasive." *Smith* v. *State*, 110 P. (2d) 851.

It is an acknowledged legal doctrine that when the duration or term of an office is a question of doubt or uncertainty, the interpretation should be followed which limits such office to the shortest term:

"When the duration or term of an office is a question of doubt or uncertainty, the interpretation should be followed which limits such office to the shortest term." *Dobkins* v. *Reece*, 17 S.W. (2d) 81.

"Where there are two modes of construing a statute, that should be followed which fixed the term at the shortest period." *Chamske* v. *Cowan*, 284 N.W. 711.

See the cases of *State* v. *McKay*, 155 S.W. 396; *People ex rel. Eldred* v. *Palmer*, 47 N.E. 1084, and Meechem on Public Officers, section 390, which uphold this same theory.

For the foregoing reasons, the respondent Board respectfully prays this court to issue an order, in these proceedings, staying the execution of the judgment rendered in the case at bar on June 28, 1940, insofar as said judgment orders the reinstatement of petitioner Carlos M. de Castro in the office of city manager of the capital, as the tenure of said office, for which petitioner was elected in the year 1936, expired in January, 1941.

San Juan, Puerto Rico, October 27, 1941.

F. FERNANDEZ CUYAR,
H. GONZALEZ BLANES,
Counsel for the Respondent Board.
F. FERNANDEZ CUYAR.

Copy of this motion to stay the execution of the judgment served this twenty-seventh day of October, 1941.

GABRIEL DE LA HABA,
Counsel for Petitioner.

[Same Title.]

OPPOSITION OF APPELLANT.

[Received November 4, 1941, 9:10 A.M., Supreme Court of Puerto Rico.]

Now comes the petitioner-appellant before this Honorable Court and respectfully states:

That the appellee Board has filed a petition requesting this court to stay the execution of the judgment rendered in this case insofar as the same orders the reinstatement of petitioner-appellant, on the ground that his term of office as such city manager, for which position he was elected in the year 1936, expired in January, 1941.

Appellant's petition, according to what it requests of this court, is based on an erroneous assumption, that is, that the office of city manager is an elective office when the law creating the special government for San Juan, Act No. 99 of 1931, provides in its section 22 that the city manager shall be appointed by the Board of Commissioners and shall hold his office during good behavior.

This Honorable Court cannot take judicial notice of facts which do not exist but in the mind of the appellee and in the more or less subtle arguments set forth by its counsel. The fact remains that Mr. Benitez Castano did not cease in the exercise of his office because a part of the Board of Commissioners was again elected in 1936, but because of his voluntary resignation, effective many months after January, 1937, and that neither did the election of the city manager appear in the electoral ticket as contended by the appellee in the seventh page of its petition, since such office was not an elective office. The fact that the Commissioners to be elected by popular vote campaigned informing the people about the person who would hold the office of city manager if they were elected, does not imply that the tenure of the city manager ceased with the term of office of some of the Commissioners. It is convenient to recall in relation to this matter that the Board of Com-

missioners is composed at present of nine Commissioners of which four are appointed by the Governor of Puerto Rico and five are elected by popular vote. See Act No. 10 of March 24, 1937, which amends section 50 of Act No. 99 of 1931.

When Mr. de Castro was substituted by Mr. Fernando J. Geigel at the time when the former was removed from the office of city manager by the Board of Commissioners, Mr. Geigel held his office without a new appointment by the Board of Commissioners until a long time after January, 1941, and it was only due to his voluntary resignation that the Board designated a new city manager, Mr. Gonzalo Diago.

This also reveals that the Board of Commissioners did not believe nor construe that the term of office of the city manager ceased when the five Commissioners elected by popular vote in the elections of the year 1940 took possession.

With respect to the argument set forth by the appellee that all the employees of the Government of the capital would hold their offices for life if it should be construed that the office of city manager is held by life tenure, or during good behavior, as provided by law, we consider said argument beyond all logic and irrelevant for the following reasons:

First, because we are not concerned with the construction of the statute with reference to officers and employees of the Government of the capital but merely with the interpretation of the act specifically in relation to the office of city manager of the capital; and second, because sections 26 and 29 of Act No. 99 of 1931, do not fix a definite or indefinite tenure for the officers and employees of the Government of the capital, and consequently, the unchanging decisions of courts cited by the appellee would be applicable to the effect that when there is no fixed term of office, the office is held during the tenure of the appointing power or at its will. We are of opinion, therefore, that there is no conflict whatsoever in regard to this point, since all the officers of the capital mentioned in section 26 of the statute would hold their offices at the will of the city manager and all the employees appointed by said officers

would hold their employments at the will of the same. Furthermore, it should be observed that section 18, subdivision 5 of Act No. 99, authorizes the Board of Commissioners to create such employments which may be strictly necessary for the Government of the capital and to include the corresponding salaries in the budget.

In accordance with this authority, the Board of Commissioners may fix the term of the employments, coinciding with the term of appointment made by the city manager of the capital for the officers of the same in accordance with section 26. We see nothing in the law to prevent the city manager of the capital from fixing the term of office of the officers upon appointing them in accordance with the authority granted to him by the said section of the statute.

We are of opinion that the questions raised by the appellee with respect to the tenure of office of the city manager of the capital have already been considered and adjudged by this Honorable Court as may be seen from the brief filed by the appellant, pages 33 and 34; brief of the appellee, pages 29 and 30, and the opinion of this Honorable Court, pages 7, 8 and 9.

We cannot conceive under what authority of law the appellee may request of this Honorable Court that it stay the execution of a final judgment which has been appealed from to the United States Circuit Court for the First Circuit and which has been the object of a petition for certiorari filed in the Supreme Court of the United States. This Honorable Court lacks jurisdiction to stay the execution of its judgment, more so when, as we have already argued, the question raised was the object of judicial decision and is in consequence, *res judicata.*

Apart from what we have already stated, the interpretation placed by the appellee on the statute in relation to the term of office of the city manager of the capital is completely erroneous since it is based on statutory precepts which are completely different to the provisions of section 22 of Act No. 99 of 1931.

The cases and comments relied upon by the appellee are based

on statutes which do not fix a definite term of office to an officer or which fail to fix any term at all.

The statute creating a special government for the capital fixes a term which is "during good conduct" and consequently, none of the cases or comments cited by the appellee is applicable to our case.

The Honorable Court may examine 43 C.J. 642, cited by the appellee, which begins saying: "If no definite term is fixed . . ." and will be convinced that this citation is not applicable to the case at bar.

Nor is the case of *Woolley* v. *Flock*, cited by the appellee in the fifth page of its motion, applicable, since as it is aptly stated in said case, the Act does not fix the term of office of the mayor, etc. It will be seen that said case is based on a statute which does not fix any term of office to the mayor.

The case of *Shurtleff* v. *United States*, cited by the appellee in the sixth page of its motion, is not applicable to the case at bar since the statute therein construed, section 12, 26 Stat. at L. 131, 467 U.S. Comp. Stats. 1901, page 1886, did not fix any term whatsoever for the office of general appraiser, whose appointment should be made by the President, and the judgment of the Supreme Court of the United States was predicated on the fact that the President was justified in removing such officer for causes other than those specified in the statute since it did not expressly limit the removal by the President to said causes.

On the other hand, there are numerous judicial decisions to destroy the theory set forth by the appellee.

The appointment of officials and officers in regard to the duration of their offices has only three aspects:

> "Officers and persons in public positions hold, first, for a definite term; second, during good behavior; or, third, at the will or discretion of some other officer or department. A definite term is where the law so prescribes, which may be by statute, or the Organic Law of the State." 2 McQuillin Municipal Corporations, (2d ed.) page 163.

"All offices, the tenure of which is not fixed by the Constitution or limited by Law, must be held either during good behavior or (which is the same thing in contemplation of Law), during the life of the incumbent." *Ex Parte Hennen,* 38 U.S. 257, 10 L. ed. 152.

In the absence of any constitutional restriction, there can be no objection whatsoever to a person holding an office during good behavior, which may mean that said person hold the office for life. There is no constitutional provision in Puerto Rico which fixes the tenure of municipal officers and the Organic Act leaves all matters concerning municipal legislation to the discretion of the legislature.

"Ordinarily in the absence of any constitutional restriction there is no inherent objection under the American form of Government to the creation of public offices with the tenure of good behavior." 22 R.C.L. page 551.

The case which we cited in the lower court and before this Honorable Court at the time of discussing the interpretation of section 22 of the special law creating the Government of the capital, is the case of *Smith* v. *Bryan,* 10 Va. 199, 40 S.E. 652, where the Supreme Court of Virginia stated the following:

"Tenure during good behavior is for life unless sooner terminated for cause."

It is known that there exist many provisions in the Federal government as well as in the state governments which determine the appointment of officers to hold their offices during good behavior.

If it is recalled that the purpose sought by the Legislature of Puerto Rico in creating a special government for San Juan, practically removing a whole government elected by popular vote in the year 1931, was to introduce the system of "City Manager", who should not depend at all on political favoritism and who could hold his office without being tied to the whims and uncertainties of partisan politics, it will be better understood why the

legislature provided that this office should be held while the incumbent observed good behavior.

It was intended precisely to make an experiment and an exception in the case of San Juan, distinguishing the government of this City from those of the other municipalities regulated by the Municipal Law of Puerto Rico which provides for the appointment of mayors for a definite term of four years.

If the legislature chose this system and in practice it should fail, the courts are not the ones called upon to amend the laws by judicial construction when these laws are clear, free from ambiguities and are upheld by administrative and judicial precedents, but it is the legislature itself the one which should correct this by an amendment to the law.

This manner of amending a statute now propounded by the appellee is indeed contrary to all principles underlying democratic institutions in our nation since it seeks to have the Judicial Department interfere with a matter which is of the sole and exclusive province of the Legislative Department of the Government.

The appellee also forgets that the Board of Commissioners of the capital is a continuous body which does not change although some of its Commissioners may change and that, consequently, the fact that every four years a part of the Board be elected does not mean that the tenure of the Board of Commissioners expires every four years since, as we have said, the life of this Body is continuous. See on this point the case of *Taylor* v. *School District*, 47 Pac. 758.

In conclusion, we believe that appellee's petition does not set forth any solid legal ground to consider its pretensions as the same are based on erroneous reasons and on statutes different from those of Puerto Rico, since ours clearly provides that the term of office of the city manager of the capital shall last during good behavior and this court has already decided that the causes which brought about his removal were not sufficient and ordered his reinstatement dated back to the date when he was suspended from office and pay on January 7, 1939, thus entitling the appel-

lant to continue holding his office while he observes the sole condition imposed by the legislature that he should hold the office of city manager during good behavior.

If this Honorable Court should determine to hear the parties in relation to the appellee's petition, the appellant could furnish this court more abundant judicial decisions in relation to the matters herein discussed with the brevity and haste forced upon us by the attendant circumstances.

For the foregoing reasons it is prayed of this Honorable Court that it deny the petition of the appellee and order that the mandate be remitted to the lower court.

San Juan, Puerto Rico, November 4, 1941.

RAFAEL RIVERA ZAYAS,
GABRIEL DE LA HABA,
DAMIAN MONSERRAT, JR.,
by GABRIEL DE LA HABA,
Counsel for Petitioner-Appellant.

Copy of this motion in opposition received this fourth day of November, 1941.

F. FERNANDEZ CUYAR,
Counsel for the Respondent-Appellee.

[Same Title.]

[Received in open court on November, I mean, December 1, 1941, at 2:00 P.M. (Initialed) J.L.C. Secretary.]

ADDITIONAL GROUNDS OF OPPOSITION OF THE APPELLANT TO THE MOTION TO STAY THE EXECUTION OF THE JUDGMENT.

Now comes the petitioner before this Honorable Court by his undersigned attorneys and respectfully states:

The appellee bases all its arguments on the following premise:

That the statute creating the office of city manager of the capital does not fix any tenure to the same.

The sections of Act No. 99 of 1931, relative to the office of city manager of the capital and to the duration of its term are the following:

"Section 21. The City Manager shall be the chief executive of the Capital; he shall be appointed by the Board of Commissioners created by this Act and shall hold office during good conduct.

"Section 22. The City Manager may be removed by the Board of Commissioners, for just cause, upon hearing and an opportunity to defend himself either in person or through attorneys. The following shall be causes for the removal of the City Manager: Any act of his constituting a felony; any act of his constituting a misdemeanor and implying moral turpitude; or carelessness, inexcusable negligence in the performance of his duties, or immoral or incorrect conduct in the exercise thereof."

It is obvious from a reading of these two sections that Act No. 99 fixes a term for the exercise of the office of city manager of the capital and this term is during good conduct on the part of the incumbent.

The word "term" and the duration of an office are defined in 43 C.J., pages 641, 642, as follows:

"Term of Office. (a) Definition. 'Term of office' is a phrase used to prescribe the period of time during which one regularly chosen by election or appointment and inducted into an office is entitled to hold the same, perform its functions, and enjoy its privileges and emoluments."

"Duration (1) In General. The phrase 'term of office' is usually understood to apply to a fixed and certain term established by law for the performance of certain official duties. But although the phrase does not mean the term of actual service, it may be used with reference to a period uncertain in its duration depending upon the performance of the

duties prescribed, upon the favor of the appointing power, or upon a recall provision in the charter."

A reading of the cases and comments which we submit to the consideration of this Honorable Court immediately following will clearly show that the construction given by the courts of the United States upholds our contention that an office to be held during good conduct has a term fixed by the statutes.

It is worth noticing that when courts refer to an office to be held during good conduct they always refer to the term by means of the following phrases: "for a term to continue during good behavior"; "term of an office during good behaviour"; for a longer term than during good behavior"; "tenure of office upon good behavior".

"The city of Trenton had an ordinance in the year 1860 which provided for appointment of Police officials during good behavior.

"In 1886 the Legislature passed an Act providing 'that no person shall be removed from office or employment in the Police Department of any city, or from the police force of any city, for political reasons, or for any other cause than incapacity, misconduct, nonresidence or disobedience of just rules and regulations established or to be established.

"By ordinance of the City of Trenton of 1887, the term of the Police officials was limited to 1 year by repealing the former ordinance.

"The case went to Court on the complaint of various policemen. The Supreme Court of New Jersey said:

" 'The only question, then, is whether the ordinance of May 17th, 1887, changing the term of office from one during good behaviour to a term for one year, is in conflict with the act of the Legislature of March 23, 1886? The act expressly prohibits removal from office in the police department for political reasons, or for any cause other than incapacity, misconduct, non residence, or disobedience

to rules and regulations. The language could not be more specific or clear. The legislative purpose is unmistakable to set apart these officers as a class that shall not be affected by political changes, and to encourage them to a more careful discharge of their functions by a sense of security that they will not be displaced so long as they are faithful. Our duty ends when we interpret the law so as to give effect to legislative intention as expressed in the language of the law-maker. The relators being entitled to their offices for a term to continue during good behavior and from which they cannot be legally removed except for misconduct, the effect of the ordinance certified will be, if not arrested, to remove them by lapse of time.' *Clearly* v. *Trenton*, 50 N.J. Law 331; 13 Atl. 228."

"There is nothing in our constitution which expressly requires the legislature in creating offices to affix to them terms of definite duration. Neither is anything to be found therein which is impliedly to that effect. The only use of the word 'term' found in the constitution which can in any sense be attributable to statutory offices is in the bill of rights (Art. 1, Sec. 19), where it is provided that no office shall be created or exercised for a longer term than during good behavior. But as is apparent, this provision does not purport to require the legislature when an office is created to give to it a fixed term. All it does is to require that the tenure of office shall in no case extend beyond good behaviour, and it is equally applicable to both constitutional and statutory officers, regardless of whether the term be one of a fixed or of an indefinite duration.

"Now if a constitution contemplates that all statutory offices shall have a duration of a definite term for their occupancy and contains provisions for removal of incumbents before the expiration of such terms, it would be arguable that the legislature possessed no power to provide for a removal of an incumbent before the expiration of the term

otherwise than as the constitution provided. This is for the reason that the connotation of 'term' as applied to an office is that of a fixed and definite period (*Speed & Worthington* v. *Crawford*, 3 Metc., Ky., 207; 46 C.J. 963, citing other cases), and therefore, if the legislature attempted in creating the office to authorize the ousting of the incumbent of the term independently of the constitutional method of removal, it would be equivalent to an attempt by the legislature to provide by statute for removal of an officer from his constitutional term of office. It would be so arguable, though we do not mean to say the argument would be convincing. All we are saying is that the argument could be made.

"But no such argument is possible in this case, because as above shown the use of the word 'term' with all of its connotations is not to be found in our constitution in association with statutory offices in any sense that admits of the argument.

"The result then is that offices of statutory creation in Delaware are left in the sole discretion of the legislature in respect of the term of duration of their incumbency, unaffected by any constitutional limitation, other than this—that the legislature can in no case extend the tenure beyond good behavior. Within the limits defined by good behavior, the legislature is free to make the term of an office created by it long or short according as it sees fit in the exercise of its discretion. As there is nothing in the Delaware constitution which requires the legislature in the creation of statutory offices to prescribe fixed and definite terms for their occupancy, it must necessarily follow that no constitutional inhibition exists against the creation of such an office to be held during the pleasure of the appointing power. This is because of the familiar principle which is nowhere questioned, that in the American States, as distinguished from the Federal Government, the legislative power is as broad and ample in its omnipotence as sovereignty itself, except in so far as it

may be curtailed by constitutional restrictions express or necessarily implied.

"We are aware that in the judgment of many persons it is highly unwise for the legislature to create offices with an indefiniteness of tenure. We are not unsympathetic with that view. But it is the province of the legislature and not of the courts to pass upon matters of policy. The legislative hand is free except as the constitution restrains; and the courts are bound by a most solemn sense of responsibility to sustain the legislative will in the appropriate field of its exercise, even though in the opinion of the judges as individuals the legislature had acted in an unwise manner." *Collison* v. *State*, 119 A.L.R. 1427.

"Undoubtedly, the creation of an office is a question of political expediency; so is the qualification of the officer; and so are his duties, perquisites, punishment and the tenure by which he holds his office. By consequence, they are the subjects of legislative regulation. And as the creation, so is the continuance of the office, a question of sound discretion in the Legislature, of which a court cannot question the exercise . . . The public interest (referring to the same as reflected in the North Carolina constitution) did not require that any law should be laid down to the Legislature as to the tenure of those offices; but it was left to their discretion, as expedience might from time to time require it to be altered. It was therefore in the power of the Legislature to confer such offices for life, or during good behavior, or during pleasure, or for any term of years, determinable with life at an earlier day." *Hoke* v. *Henderson*, 15 N.C. 1, 25 Am. Dec. 677.

"Article 6, section 4, provides three methods of removing officers: (1). On 'conviction of misbehavior in office or of any infamous crime'; (2), 'at the pleasure of the' appointing power; (3) removal 'by the Governor' as specified. But

that provision must be read in connection with other provisions in the Constitution. Article 12, section 1, provides: 'All officers, whose selection is not provided for in this Constitution, shall be elected or appointed as may be directed by law.' The authority so conferred to provide for the election or appointment of other officers necessarily involves and implies legislative power to annex conditions of tenure. The Legislature may very well say that it is desirable that certain officers should be appointed but, for reasons which it deems sufficient, they should not be subjected to removal at pleasure and, if so minded, the Legislature may of course provide for such officers, the Constitution containing no provision to the contrary. When the point was passed on in *Re Milford Township Supervisors' Removal* (1927) 291 Pa. 46, 139 A. 623, 624, in dealing with this power, we said:

"'A necessary implication from this provision, and indeed, also, from the Legislature's supreme power to legislate on all subjects not constitutionally inhibited (*Likins' Petition* (No. 1), 223 Pa. 456, 72 A. 858; *Com.* v. *Reid*, 265 Pa. 328, 334, 108 A. 829), is that it had the right to provide that their election or appointment should be for a definite or an indefinite term, absolutely or conditionally, and this might be set forth in a single section, or in two or more sections, which, of course, would be construed together (*Holl* v. *Deshler*, 71 Pa. 299; *Com.* v. *Danville Bessemer Co.*, 207 Pa. 302, 308, 56 A. 871). It follows, if a fair construction of the statute, providing for their election or appointment, results in the conclusion that under it they were only intended to be conditionally elected for a specified term, that effect must be given to the legislative intent, notwithstanding the provisions of article 6, section 4, for not otherwise can they "be elected or appointed as may be directed by law."'" *Weiss* v. *Ziegler*, 112 A.L.R. 106.

"It was indicated in *People ex rel. Percival* v. *Cram* (1900) 164 N.Y. 166, 58 N.E. 112, and *People ex rel. Ray* v. *Henry* (1900) 47 App. Div. 133, 62 N.Y.S. 102, that under the New York Constitution providing: 'When the duration of any office is not provided by the Constitution, it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment,' the Legislature could prescribe that the term of an office should be during good behavior, and that such officer could be removed only after a hearing or trial. However, in the Percival and Ray Cases the statute creating the offices involved failed to fix the duration thereof, and, moreover, expressly permitted the appointing authorities to remove the incumbents at pleasure.

"And in *Jarvis* v. *Waterbury* (1895) 84 Hun, 462, 32 N.Y.S. 389, where it appeared that the statute creating the commissioners of improvements of the Town of Westchester provided that the town supervisor should appoint five commissioners who should be a body corporate known as the commissioners of improvements, and that whenever a vacancy should occur through death, resignation, or refusal to act, the remaining commissioners should appoint someone to fill such vacancy,—in default of their so doing, the supervisor to fill it,—it was held that the tenure of the office of commissioner was fixed by the statute, since it created a body corporate by the appointment of five persons by the supervisor and provided for its perpetuity by the filling of vacancies, and consequently the supervisor had no power to remove such commissioners at his pleasure." Annotation, 112 A.L.R. 110.

We think it advisable to state to this Honorable Court our reasons for sustaining that the case cited by appellee, *Woolly* v. *Flock*, at page 5 of its motion, is not applicable to the case at bar because the decision rendered in said case is based on a statute of the State of New Jersey which did not fix a definite or indefinite

term of office to the mayor and because that was the reason why the Supreme Court of New Jersey held that the term of office of the relator should be construed as fixed by the statute for the life of the Board which appointed him.

> "The city of Long Branch is now governed by the Walsh Act.
>
> "Woolly was elected by the Board on May 16th, 1916. In January, 28th, 1918, Flock was chosen mayor. Woolly contended that he was chosen for the life of the Board and Flock that he was chosen *'durante bene placito'*.
>
> "Section 2 of the Walsh Act after reference to the initial election, declares that those who are elected 'shall serve as such commissioners until the third Tuesday in May of the fourth year following such election and every fourth year thereafter, etc.'
>
> "At the first meeting after their election, the said commissioners shall choose one of their number to preside at all meetings of the board of commissioners, and he shall be designated 'mayor'.
>
> "The court said: 'We are of the opinion that the relator's term was fixed by statute for the life of the Board; that is to say, for four years.'" *Woolly* v. *Flock*, 105 Atl. 489 (New Jersey).

The cases cited in appellee's motion, *Burgan* v. *Civil Service Commission*, 86 Atl. 929, and *Smith* v. *Reagan*, 23 Atl. 1012, are discussed in the text of the opinion delivered in the case of *Woolly* v. *Flock* which we have summarized above.

In conclusion, petitioner-appellant maintains that since the statute creating a special government for San Juan fixes the term of his office and as this Honorable Court has already held that the causes alleged by the appellee to remove him from said office were not sufficient and as a consequence of said decision appellant's reinstatement was decreed, the motion to stay the execution of the judgment which orders the reinstatement of the appellant

dated back to the date when he was suspended from office and pay by the appellee Board, should not be granted.

San Juan, Puerto Rico, December 1, 1941.

Respectfully submitted,

GABRIEL DE LA HABA,
RAFAEL RIVERA ZAYAS,
DAMIAN MONSERRAT, JR.,
Counsel for Appellant.

Copy of this motion received this first day of December, 1941.

Counsel for Appellee.

SENATE OF PUERTO RICO

Thirteenth Legislature Fourth Regular Session. S. B. 213

IN THE SENATE OF PUERTO RICO

March 20, 1936.

Mr. Iriarte presented the following bill (which was referred to the Committee on Insular and Municipal Government and Elections):

ACT

To Amend Sections 10, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32(a), 32(b), of Act No. 99, Approved on May 15, 1931, Entitled "An Act to Establish a Special Government for the Capital of Porto Rico, and for Other Purposes", as it Has Been Subsequently Amended, and for Other Purposes.

Be it enacted by the Legislature of Porto Rico:

Section 1. That sections 10, 20, 21, 22, 23 24, 25, 26, 27, 28, 29, 30, 31, 32(a), 32(b), of Act No. 99 entitled "An Act to Establish a Special Government for the Capital of Porto Rico, and for other purposes", approved on May 15, 1931, as it has been subsequently amended, are hereby amended as follows:

"Section 1. That in all those sections wherein the Executive Municipal Officer is referred to as the City Manager of the Capital, said title be substituted by the title of Mayor of the Capital."

Section 2. That the Mayor of the Capital shall be elected by

popular vote in the general elections to be held in November, 1936, and every four years from then on.

Section 3. All laws or parts of laws in conflict with these provisions are hereby repealed.

Section 4. This law, by reason of its urgent and necessary nature, shall take effect immediately after its approval.

I Yldefonso Sola Morales, Secretary of the Senate of Puerto Rico, Certify:

That the foregoing is a true and faithful copy of the original of Senate Bill 213 filed in the archives of the Senate of Puerto Rico, intrusted to my custody.

And to be delivered to Dr. Carlos M. de Castro, I issue, sign and seal the present copy in my office on this the third day of November of the year Nineteen Hundred and Forty-one.

(Sgd.) YLDEFONSO SOLA MORALES,
Secretary of the Senate.

There is affixed a cancelled internal revenue stamp serial number A0609708, for the amount of one dollar.

SENATE OF PUERTO RICO

Fourteenth Legislature First Regular Session. S. B. 20

IN THE SENATE OF PUERTO RICO

February 10, 1937.

Mr. Iriarte presented the following bill (which was referred to the Committee on Insular and Municipal Government and Elections).

ACT

To Amend Sections 10, 20, 21, 22, 23, 24 25, 26, 27, 28, 29, 30, 31, 32(a) 32(b), of Act No. 99, Approved on May 15, 1931, Entitled "An Act to Establish a Special Government for the Capital of Porto Rico, and for Other Purposes", as it Has Been Subsequently Amended, and for Other Purposes.

Be it enacted by the Legislature of Porto Rico:

Section 1. That sections 10, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32(a), 32(b), of Act No. 99 entitled "An Act to Establish a Special Government for the Capital of Porto Rico, and for other purposes", approved on May 15, 1931, as it has been subsequently amended, are hereby amended as follows:

"Section 1. That in all those sections wherein the Executive Municipal Officer is referred to as the City Manager of the Capital, said title be substituted by the title of Mayor of the Capital."

Section 2. That the Mayor of the Capital shall be elected by popular vote in the general elections to be held in November, 1940, and every four years from then on.

Section 3. All laws or parts of laws in conflict with these provisions are hereby repealed.

Section 4. This law, by reason of its urgent and necessary nature, shall take effect immediately after its approval.

I, Yldefonso Sola Morales, Secretary of the Senate of Puerto Rico, Certify:

That the foregoing is a true and faithful copy of the original of Senate Bill 20 filed in the archives of the Senate of Puerto Rico, intrusted to my custody.

And to be delivered to Dr. Carlos M. de Castro, I issue, sign and seal the present copy in my office on this the third day of November of the year Nineteen Hundred and Forty-one.

YLDEFONSO SOLA MORALES,
Secretary of the Senate.

There is affixed a cancelled internal revenue stamp serial number A0609707, for the amount of one dollar.

[Title omitted.]

OPINION OF THE COURT.

DELIVERED BY MR. JUSTICE DE JESUS.

San Juan, Puerto Rico, January 14, 1942.

On April 11, 1939, Dr. Carlos M. de Castro filed a petition for certiorari in the District Court of San Juan, requesting the review

and annulment of a certain resolution adopted by the Board of Commissioners of San Juan on the fifth day of that same month and year, dated back to January 7, 1939, whereby he was removed from the office of city manager of the Capital, to which position he had been appointed by said Board on January 4, 1937. The petition was denied by judgment rendered on August 21, 1939, and the petitioner resorted to this court, the judgment appealed from being reversed on June 28, 1940, and in its stead another was rendered whose dispositive part insofar as pertinent reads as follows:

> ". . . and in its stead a new one rendered, annulling Ordinances No. 370 of January 5, 1939, and No. 373, of April 5, 1939, which decreed the suspension and removal of the city manager, and in consequence thereof ordering the reinstatement of the petitioner Carlos M. de Castro in his office of City Manager, said reinstatement to date back from January 5, 1939, when the petitioner was suspended from office and pay." 57 P.R.R. 149, 159.

Feeling aggrieved, the Board of Commissioners appealed to the United States Circuit Court of Appeals for the First Circuit, which affirmed the judgment of this court on October 20, 1941, and the Supreme Court of the United States denied the petition for certiorari filed by the Board of Commissioners to review the last mentioned judgment.

After the mandate had been returned to this court, the Board of Commissioners, on October 27, 1941, filed a lengthy motion in this court, duly notified to counsel for petitioner-appellant, praying that we stay the execution of our judgment of June 28, 1940, insofar as it decrees the reinstatement of the petitioner Carlos M. de Castro in the office of city manager of the capital because the term for which he was appointed had elapsed since January, (*sic*) 1941. Petitioner objected by motion filed on the 4th of November last, and the matter was finally submitted after a hearing held for that purpose on the first day of last month.

In opposition to the contention of the Board of Commissioners, the petitioner Dr. de Castro holds that the office of city manager of the capital is for life during good behavior; that the issues raised by the appellee Board in relation to the tenure of office of the city manager of the capital were adjudged by this court in its judgment rendered on June 28, 1940, which is final and executory; and finally, that we lack jurisdiction to stay the execution of a final judgment in regard to a matter which has the authority of *res judicata.*

Contrary to what is sustained by counsel for petitioner Dr. de Castro, the judgment of this court of June 28, 1940, made no finding whatsoever nor even mentioned in the opinion attached thereto the duration of the term of office of the city manager of the capital. It could not have been otherwise since that question was not nor could have been in issue, since as Dr. de Castro was appointed on January 4, 1937, at the time of the hearing on the certiorari filed by him in the District Court of San Juan, when that court rendered its judgment of August 21, 1939, and when that of this court was rendered on June 28, 1940, the term of four years for which, as held by the Board of Commissioners, he had been appointed, had not expired. The sole question adjudged within said proceedings was the charges brought against petitioner and nothing else. Consequently, the matter now before us does not have the authority of *res judicata.*

Neither in his pleading in opposition nor in the memorandum afterwards filed by him on the first of last month does petitioner allege any legal ground to uphold his contention that this court lacks jurisdiction to pass upon and decide this controversy.

The judgment whose execution is in issue was rendered by this court instead of the one rendered by the District Court of San Juan and the question now raised by the Board involves an incident in relation to the execution of that judgment in the light of facts and circumstances which took place after the date when it was rendered. Then, as we have seen, the term of four years for which petitioner was appointed, as sustained by the Board, had

not expired, but now, when it is sought to execute said judgment, it is alleged that the term has elapsed. If we should decide in fact that the term for which he was appointed expired last year, or to be more specific, on the second Monday of February, 1941, (section 50 of Act No. 99 of 1931, amended by Act No. 10 of 1937, page 131), would it not be contrary to the statute and to justice that, availing himself of the terms of that judgment, petitioner should be reinstated in an office to which he has no right? For such eventuality, the law, which does not conceive an evil without a remedy, confers on this court the authority to grant it, providing in section 7, subdivision 8 of the Code of Civil Procedure that every court has power to control its process and orders so as to make them conformable to law and justice. See by analogy *McAuliffe* v. *Coughlin,* 105 Cal. 268; *Rowe* v. *Blake,* 112 Cal. 637, 643.

Having decided the preceding questions, the time has come to consider and decide the one relative to the term of office of the city manager of the capital.

Although the National Constitution does not forbid it, the only offices with a life tenure in the federal government are those of judges. The Constitution provided it thus to safeguard the independence of the national judiciary. The other federal offices wherein that necessity does not concur, do not enjoy that privilege. Therefor, the life tenure is the exception and hence the rule of construction universally accepted which provides that the tenure of an office shall not be understood to be for life unless the intention of the legislature to that effect appears to be so evident as to permit of no doubt. If there should be doubt, it shall be understood that the term of the office will be the shortest within a reasonable interpretation.

Petitioner's contention is predicated fundamentally on section 21 of the already cited Act No. 99 of 1931 (page 626) which copied literally reads as follows:

> "Section 21.—The City Manager shall be the chief executive of the Capital; he shall be appointed by the Board of

Commissioners created by this Act and *shall hold office during good conduct.*" (Italics ours.)

In the case of *Shurtleff* v. *United States,* 189 U.S. 311, cited by counsel for the Board of Commissioners, a federal statute was construed whose section 12 reads as follows:

> "Sec. 12. That there shall be appointed by the President, by and with the advice and consent of the Senate, nine general appraisers of merchandise, each of whom shall receive a salary of seven thousand dollars a year. Not more than five of such general appraisers shall be appointed from the same political party. They shall not be engaged in any other business, avocation, or employment, *and may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office . . .*" (p. 313) (Italics ours.)

Shurtleff had been appointed for one of said offices on July 17, 1890, and continued to hold the same until May 3, 1899, when, without having previously brought charges against him, President McKinley sent him a communication removing him from office, to take effect upon the appointment and qualification of his successor. Shurtleff alleged that inasmuch as the statute specified certain causes for which the officer might be removed, it thereby impliedly excluded the right to remove for any cause other than those specified in the law, and he invoked, by way of illustration, the maxim *expressio unius est exclusio alterius.*

The Supreme Court of the United States, upholding the action taken by the President, expressed itself thus:

> "We are of opinion that as thus used the maxim does not justify the contention of the appellant. We regard it as inapplicable to the facts herein. The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by Constitution or statute. It requires plain language to take it away. Did

Congress by the use of language providing for removal for certain causes thereby provide that the right could only be exercised in the specified causes? If so, see what a difference in the tenure of office is effected as to this office, from that existing generally in this country. The tenure of the judicial officers of the United States is provided for by the Constitution, but with that exception no civil officer has ever held office by a life tenure since the foundation of the government. Even judges of the territorial courts may be removed by the President. (Citation) To construe the statute as contended for by appellant is to give an appraiser of merchandise the right to hold that office during his life or until he shall be found guilty of some act specified in the statute. If this be true, a complete revolution in the general tenure of office is effected, by implication, with regard to this particular office. We think it quite inadmissible to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. The rule which is expressed in the maxim is a very proper one and founded upon justifiable reasoning in many instances, but should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century and the consequent curtailment of the powers of the executive in such an unusual manner." (p. 316.)

Further on, in the course of its opinion, the court repeats:

"We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt." (p. 318.)

If we construe section 21, *supra*, in relation to the other provisions of the statute, especially section 39, as is advised by the

canons of legal construction, the doubt becomes stronger in regard to the intention of the legislator. In its pertinent part, said legal precept reads as follows:

> "All appointments of employees shall be made by the respective officers, according to the department of the Capital in which they render services. *Said employees shall be appointed for the term for which each officer is appointed.* The employees of the Capital may be removed for just cause by the officer appointing them, after a hearing and an opportunity to defend themselves. . . ." (Italics ours.)

If we were to hold that the tenure of the office of city manager of the capital is for life then we would confront ourselves with the following anomalies:

(1) The treasurer of the capital, the director of public works, the director of health and charities, the school director and the secretary of the capital, who, according to section 26 must be appointed by the city manager of the capital, might be appointed for a limited term to be fixed by the city manager, while the employees attached to the office of the city manager of the capital, let us say, for example, the messenger of his office, by the mere fact of being appointed by the city manager would hold his employment for life unless removed for just cause.

It could not have been the intention of the legislator to establish such an absurd difference between the tenure of office of an employee and that of officers as important as those enumerated in section 26, *supra.*

(2) An uncalled for discrimination would be created between the employees appointed by the officers of the Government of the capital and the employees appointed by the city manager, as the former would hold their employments during the tenure of the appointing officer while the term of office of the employees appointed by the city manager would be for life.

In the case of *Smith* v. *Bryan,* 40 S.E. 652, 654, it was said by the Supreme Court of Appeals of Virginia:

"It is a rule of construction that, if a statute is of doubtful import, a court will consider the construction put upon the act when it first came into operation, and that construction, after lapse of time, without change either by the legislature or judicial decision, will be regarded as the correct construction. Suth. St. Const. Sec. 307; *Anable* v. *Com.*, 24 Grat. 563–566; *Lewis* v. *Whittle*, 77 Va. 415, 422; *Mangus* v. *McClelland*, 93 Va. 786, 789, 22 S.E. 364.

"So, also, the practical construction given to a statute by public officials and acted upon by the people, is not only to be considered, but in cases of doubt will be regarded as decisive. It is allowed the same effect as a course of judicial decision. The legislature is presumed to be cognizant of such construction, and, when long continued, in the absence of legislation evincing a dissent, the courts will adopt that construction.

". . . . . .

"Plaintiff in error accepted his appointment presumably with knowledge of the limitations affixed to his tenure by the construction referred to. He therefore took subject to that construction, and cannot now be permitted to insist upon a different construction."

In our opinion, it is not a matter beyond all doubt that it was the legislative intent to make the office of city manager one for life, and in the face of this doubt it is proper, in accordance with the trend of decisions, to choose the shortest tenure, that of four years, which is the one of the majority, at least, of the Board of Commissioners which appointed him.

It is said to this effect by a well known author:

"Where the legal provision prescribing the term is uncertain or doubtful, an interpretation will be adopted which limits the term to the shortest time." McQuillin, Municipal Corporations, 2nd ed. 1939, vol. 2, p. 219.

See on this point the annotation in 135 A.L.R. 1173, 1175, and

the cases of *Aggeler* v. *Dominguez*, (1933), 217 Cal. 429, 19 P. (2d) 241; *Lowrie* v. *Brennan*, (1937), 283 Mich. 63, 276 N.W. 900; *Chamski* v. *Cowan*, (1939), 288 Mich. 238, 284 N.W. 711; *Dobkins* v. *Reece*, (1929, Tex. Civ. App.), 17 S.W. (2d) 81.

The political parties of this Island have always construed this statute in the sense that the tenure of office of the city manager of the capital is that of four years, and since its section 50 was amended in 1937, it is on the second Monday of February of the year following each general elections when the Board of Commissioners appoints him. Courts take judicial notice of that which constitutes common knowledge, and it is of common knowledge, at least among the inhabitants of this city and particularly among the voters, who have been the candidates of the different political parties for the office of city manager of the capital in the last two general elections. See in regard to judicial notice, 9 Wigmore on Evidence (Third Edition, 1940), section 2571, page 548; *City of Birmingham* v. *Martin*, 153 So. 235; *Byrne* v. *Scipio et al.* (N.J., 1937), 19 Atl. 444. Consequently, we take judicial notice that petitioner was a candidate for the office of city manager of the capital for the coalition of the "Union-Republicana" and "Socialista" parties, in the general elections held in 1936, Dr. M. Pavia Fernandez being his opponent at the time for the "Liberal Puertorriqueno" party. Likewise, it is a matter of common knowledge in this city that in the general elections held in 1940, the candidate for that same office for the coalition of the "Union-Republicana" and "Socialist" parties was Mr. Fernando Geigel; for the "Popular Democratico" party, Mr. F. Benitez Rexach and for the "Unificacion Puertorriquena Tripartita" party, Mr. R. Ramos Cobian, and that the first of said parties having won the last held elections, the Board of Commissioners appointed Mr. Geigel city manager of the capital.

It is true, as contended by petitioner, that the office of city manager of the capital does not appear in the electoral ticket corresponding to the capital of Puerto Rico. Neither does the candidacy of the President of the United States appear in the

electoral ticket in the general elections and yet it is known that the candidate nominated in the convention of the party which wins the general elections will be the President of the United States.

We deem it appropriate now to state, and we have taken judicial notice of it, that petitioner appeared in the electoral ticket of the "Unificacion Puertorriquena Tripartita" party as a candidate for the office of member of the House of Representatives, for the precinct of Santurce, in the last general elections, and this took place several months after the judgment of this court had been rendered whereby the reinstatement of petitioner in the office of city manager of the capital was ordered. This action of petitioner is in harmony with the interpretation to which we have referred lately and tends to show his conviction that he would not be able to continue holding the office of city manager of the capital once the term of four years which would elapse on the second Monday of February, 1941, had expired.

If that has been the interpretation placed on said statute by the different political parties, by the public in general and petitioner himself, it seems evident that the interpretation suggested by petitioner is very doubtful, to say the least, and that being so, we must decide that the tenure of office of the city manager of the capital is that of four years, provided that during the same he observe good behavior.

The Board, as well as appellant, cite different cases in support of their respective contentions, which we do not intend to discuss in order not to extend unnecessarily this opinion. Yet, we have examined these cases and none is strictly applicable to the case at bar, since they construe statutes which although similar, are not equal to the one herein involved, and it is known that a slight discrepancy between two statutes frequently gives rise to constructions which are completely antagonistic. That is why in this case we have followed what we deem to be the best practice in construing a statute, that is, without ignoring the construction placed on other similar ones, to carefully study it in its different

provisions, harmonizing the ones with the others so as to find out, from their text, the actual purpose of the legislator.

For the foregoing reasons, the motion of the Board of Commissioners of San Juan, filed on October 27, 1941, is granted, and in consequence thereof the execution of the judgment of this court, rendered on June 28, 1940, is stayed insofar as it decrees the reinstatement of petitioner Dr. Carlos M. de Castro in the office of city manager of the capital for the reason that the term for which he was appointed expired in February, 1941.

A. R. DE JESUS,
Associate Justice.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[Same Title.]

JUDGMENT.

San Juan, Puerto Rico, January 14, 1942.

For the reasons set forth in the foregoing opinion, the motion filed by the Board of Commissioners of San Juan on October 27, 1941, is granted, and in consequence thereof the execution of the judgment of this court of June 28, 1940, is stayed insofar as it decrees the reinstatement of petitioner Dr. Carlos M. de Castro in the office of city manager of the capital because the term for which he was appointed expired in February, 1941.

It was so ordered by the court as witness the signature of the Chief Justice. Mr. Justice Todd, Jr. took no part in the decision of this case.

EMILIO DEL TORO,
Chief Justice.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[Same Title.]

MOTION FOR RECONSIDERATION.

[Received January 29, 1942. 2:25 P.M. Supreme Court of Puerto Rico.]

Now comes the petitioner appellant by his undersigned attorneys and respectfully states:

That on January 14, 1942, this Honorable Court rendered a judgment based on the grounds stated in the opinion attached thereto, by virtue of which the judgment of this court of June 28, 1940 (*De Castro* v. *Board of Commissioners*, 57 P.R.R. 149), was amended insofar as it dealt with the duration of the term of office of the city manager of the capital and his right to the reinstatement ordered in the aforementioned judgment.

Petitioner appellant respectfully prays this Honorable Court to reconsider its judgment of January 14, 1942, on the following grounds:

1. Said judgment is in conflict with what appears from the record in relation to the construction of section 21 of Act No. 99 of May, 1931, to establish a special government for the Capital of Puerto Rico, which fixes the duration of the term of office of the city manager of the capital, and for such reason, it amends and fundamentally upsets a status of *res judicata*.

2. The aforementioned judgment of January 14, 1942, is null and ineffective inasmuch as it:

(a) Amends the judgment of June 28, 1940, in a material and essential part, after the term of the court during which it was rendered had expired, after said judgment had been appealed from to and affirmed by the United States Circuit Court of Appeals for the First Circuit and this decision reaffirmed by the denial of the petition for certiorari filed in the Supreme Court of the United States.

(b) Deprives petitioner appellant of a property right without the due process of law since an issue in law is adjudged against

him without having given the appellant an opportunity to offer evidence in regard to matters of fact.

(c) Amends the final judgment of the United States Circuit Court of Appeals for the First Circuit which affirmed in all of its parts the one rendered by this Honorable Court on June 28, 1940, when the latter court no longer had jurisdiction over the parties nor over the subject matter of the action, exception made of its ministerial duty of returning the mandate of the affirmed judgment to the District Court of San Juan.

3. Because this Honorable Court has given to the case of *Shurtleff* v. *United States*, 189 U.S. 311, a scope and an application which it does not have in relation to the case at bar, since that case had to do with a public office which had no definite tenure fixed by the statute and the statements of the Supreme Court in relation to the possible life tenure of the office were mere *obiter dicta*.

Before stating our arguments in support of the different issues raised in this motion, we think it convenient to make a chronological narration of the history of this case.

On June 28, 1940, this Honorable Court rendered judgment reversing the judgment appealed from the District Court of San Juan. (*De Castro* v. *Board of Commissioners*, 57 P.R.R. 149.)

This judgment was notified to the appellee which, on July 13, 1940, filed two petitions in this court, one for reconsideration of the judgment and the other requesting its nullity. Both petitions were argued at length, citing numerous judicial decisions. In neither of these motions did the appellee request the amendment or correction of the judgment of June 28, 1940, in relation to the construction of section 21 of the law creating a special government for San Juan and the duration of the term of office of the city manager of the capital. Both motions were denied by this Honorable Supreme Court.

On July 17, 1940, the respondent appealed to the United States Circuit Court of Appeals for the First Circuit, and on July 30,

1940, this court approved a supersedeas bond for the amount of $12,000.

On January 10, 1941, the United States Circuit Court of Appeals for the First Circuit affirmed the judgment of this Honorable Court. (Board of Commissioners *v.* De Castro, No. 3643, October Term, 1940.)

On February 10, 1941, the reconsideration of the judgment was denied and on February 24, 1941, the Circuit Court ordered the increase of the supersedeas bond in 6,000 additional dollars, leaving the approval of the same to this Honorable Court. In the assignment of errors and in the statement of appeal before the United States Circuit Court of Appeals for the First Circuit, the party appellant did not raise any question whatsoever regarding the construction of section 21 and the duration of the term of office of the city manager of the capital notwithstanding that at the time of its appeal, the date when it is now alleged that the term of office of the city manager expired, was six months away.

On May 13, 1941, the respondent applied for a writ of certiorari in the Supreme Court of the United States. Neither did it adduce in its petition any argument in relation to the construction of section 21 or in relation to the duration of the term of office of the city manager and this, notwithstanding the fact that on that date, according to respondent's theory, the tenure of office of the city manager had already expired.

On October 13, 1941, the certiorari was denied by the Supreme Court of the United States and the mandate remitted to the United States Circuit Court of Appeals, which in turn, remitted its mandate to this Honorable Court on October 20, 1941.

On October 27, 1941, the respondent appellee filed the motion which was the object of the judgment rendered by this court on January 14, 1942.

In order to simplify matters and for a better understanding of our contentions, we shall argue them according to the numerical order which we have assigned them.

CONTENTION NUMBER 1.

The controversy in this case had to do at all times, since the commencement of the action in the District Court of San Juan, with the scope and construction of sections 21 and 22 of Act No. 99 of 1931 (Laws of 1931, page 626).

Although it is true that this Honorable Court in its judgment of June 28, 1940, made no special finding in relation to the duration of the term of office of the city manager, it implicitly upheld his right to hold such office during good behavior, when it held that the causes for removal were not the causes provided by law.

In the course of the whole resolution whereby the city manager of the capital was removed from office, it is dealt with the good conduct provided by section 21 of the statute, and because the Board found that the city manager had not observed such good conduct it removed him from office. (Transcript of Record, pages 5, 6 and 7.)

In the brief filed by appellant the construction of the phrase "during good conduct" found in section 21 of the "Act to Establish a Special Government for the Capital of Puerto Rico", was considered.

> "We must carefully bear in mind in considering whether the City Manager of the Capital was granted all the means of adequate defense and whether the due process of law was observed, that he is an officer who, although not elected by popular vote, has an indefinite term of office which may be considered for life, since the phrase 'during good conduct', found in section 21 of the act establishing a special government for the Capital, makes his office one for life and not one for a fixed term.
>
> "'An official tenure during good behavior is for life unless sooner terminated for cause. And removal for cause implies a right to be heard and a trial in some form of procedure or other.' *Smith* v. *Bryan,* 100 Va. 199, 40 S.E. 652."

See appellant's brief, pages 33 and 34.

In the motion to quash the writ of certiorari issued by the lower court, there was also raised before said court the question regarding the construction of section 21 of the act creating a special government for San Juan. (See Transcript of Record, pages 19, 24 and 38.)

In the motion to quash the writ (page 29 of the Transcript of the Record), the respondent appellee cited the case of *Shurtleff* v. *United States,* 189 U.S. 311, as well as the case cited by petitioner appellant, *Ex parte Hennen,* 13 Peters 230.

In the brief filed by respondent appellee, pages 7, 14, 19, 28 and 29, section 21 of the law and the duration of the term of office of the city manager of the Capital were discussed. The pertinent parts discussed in appellee's brief, whose pages we have already cited, read as follows:

> "The office of City Manager of the Capital is a highly privileged one and the person who holds it in accordance with the letter and spirit of the municipal statute is responsible solely and exclusively to the power which appointed him, that is, to the Board of Commissioners of the Capital.
>
> "When the lawmaker, besides conditioning the tenure of the City Manager on good behavior. . . .
>
> "Besides, we sustain that when the legislator said in section 21 of Act No. 99 of 1931 that the City Manager of the Capital would hold his office during good conduct, and it is a section so independent from section 22 that we can assure that the office of City Manager of the Capital is at the discretion of the Board of Commissioners, the appointing power, which could and may remove him when in its opinion the City Manager should fail to observe the good conduct which in the judgment of said Board he should observe.
>
> "(a) Because Act No. 99 of 1931, which governs the destinies of the administration of the Capital of Puerto Rico, reads as follows in its section 21, page 638; 'The City Manager shall be the chief executive of the Capital; he shall be

appointed by the Board of Commissioners created by this Act and *shall hold office during good conduct.'*

"Section 21 of Act No. 99 of 1931 stands by itself and independently from and has nothing to do with section 22 of the same statute. The City Manager is the creation of the appointing power, Board of Commissioners of San Juan, holds that office at the will of the Board, until this Body, which constitutes the Government of San Juan and which is responsible before public opinion, should arrive at the conclusion that the City Manager of the Capital has failed to observe good conduct.

"Section 22, independent of and different from section 21, even in its wording, apart from the good conduct established in section 21 and as an addition to the causes for removal of the City Manager of the Capital, adds, after prescribing the procedure, the following additional causes for the removal of the mayor, that is, the following:

"As it will be seen, the City Manager of the Capital is the only officer in Puerto Rico who retains, independently from the appointing power, his office during good behavior. That is, the tenure of his office is not limited and he holds the same until the time when the appointing Board should be of the opinion that he has failed to observe good conduct or that he has performed, in addition to and independently from the good behavior, any of the acts specified in section 22 of the same statute. On this point we cite to the Court the following decisions:

" 'It is a well established rule of law that the power to appoint to an office or position, where the term or tenure is not defined, carries with it the power of removal. The Supreme Court of the United States in an early case, which has only been followed, said: "All offices, the tenure of which is not fixed by the constitution or limited by law, must be held (1) either during good behavior, or (which is the same thing in contemplation of law) during the life of

the incumbent; or (2) must be held at the will and discretion of some department of the government, and subject to removal at pleasure. It cannot, for a moment, be admitted that it was the intention of the Constitution, that ıese offices that are denominated inferior offices, should : held during life. And if removable, by whom is such removal to be made. In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. *Ex parte Hennen*, 13 Peters (38 U.S.) 230, 259, 10 L. ed. 138, followed *In Re Eaves*, 30 Fed. 21, 23; *In re Commissioners of Circuit Court*, 65 Fed. 314, 318; see *Todd* v. *U. S.*, 158 U.S. 278, 282, 15 Sup. Ct. 889, 39 L. ed. 982; *U.S.* v. *Allred*, 155 U.S. 591, 594, 15 Sup. Ct. 231, 39 L. ed. 273; *Parsons* v. *U. S.*, 167 U.S. 324, 331, 17 Sup. Ct. 880, 42 L. ed. 185; *U.S.* v. *Perkins*, 116 U.S. 483, 16 Sup. Ct. 1073, 41 L. ed. 287, affirming 20 Ct. of Cl. 438; *Blake* v. *U.S.*, 103 U.S. 227, 231, 26 L. ed. 462; *Ex parte Wall*, 107 U.S. 265, 2 Sup. Ct. 569, 27 L. ed. 552." ' "

In view of the foregoing this court will see that the matter regarding the tenure of office of the city manager was raised and fully discussed before this court and it is presumed that it was taken into account when its judgment of June 28, 1940, was rendered, but even if it should not have been the object of a specific judicial decision, the question was submitted and is considered *res judicata*.

"*Res judicata* may be pleaded as bar, not only as respects matters actually presented to sustain or defeat the rights asserted in the earlier proceeding, but also as respects any other available matter which might have been presented to that end." *Chicot County* v. *Baxter State Bank*, 308 U.S. 371; *Grub* v. *Public Utilities Commission*, 281 U.S. 470; see 15 Cal. Jur., section 193, p. 142; section 195, p. 146; section 206, p. 162.

CONTENTION NUMBER II. (a) (b) (c).

The judgment of January 14, 1942, was based on the faculty which, according to the court's view, is conferred upon it by subdivision 8 of section 7 of the Code of Civil Procedure, which determines that every court has power to control its process and orders so as to make them conformable to law and justice.

The above cited section is equivalent to section 128 of the Code of Civil Procedure of California.

Section 128, subdivision 8 of California reads as follows:

"Every court shall have power:

"

"8. To amend and control its process and orders so as to make them conformable to law and justice."

It is our opinion that there exists an important difference of construction of the word "process" when the same is translated into Spanish as "*providencia*". But notwithstanding this, the scope of said legal provision does not warrant any court to vacate or amend its judgments in such a way, once they have been registered in the judgment-book that such amendments involve, not the correction of an error but a material variation which completely changes the rights of the parties, adjudged and determined by the amended judgment.

See Fairall's Code of Civil Procedure of California, Part I, Section 128, page 79, and the annotation and judicial decisions cited in relation to subdivision 8.

It is a universal and invariable doctrine that once a judgment is registered it cannot be amended except in the manner provided for in the Code and for the causes and reasons established in the same.

The Code of Civil Procedure of Puerto Rico includes section 140, equivalent to section 473 of the Code of Civil Procedure of California, which provides the reasons and the manner in which a court may exempt a person from the effects of a judgment, order or other proceeding. Said section provides that the petition for

that purpose must be filed within a reasonable period which shall not exceed six months from the expiration of the judicial term.

The Supreme Court of Puerto Rico rendered its judgment of June 28, 1940, during the term of May, 1940, which term lasted for six weeks counted from the third Monday of May, in accordance with the provisions of section 4 of the "Act Fixing the Terms of the Supreme Court of Puerto Rico", approved on March 1, 1902, Code of Civil Procedure of Puerto Rico, page 289. The respondent appellee had until the end of December, 1940, to request any amendment to which it might be entitled in accordance with section 140, for the reasons therein specified.

It is also a well settled rule that when a judgment is not susceptible of being amended, the only remedy available to the interested party is to move for a new trial or to appeal to a superior court.

The respondent appellee did not request any amendment based on section 140, nor did it move for a new trial, but chose to appeal its case to the Circuit Court of Boston, thus depriving the Supreme Court of Puerto Rico of jurisdiction over the same. We have already stated that when it appealed its case to the United States Circuit Court of Appeals for the First Circuit, the respondent did not raise any question regarding any alleged error committed by the Supreme Court in construing section 21 nor in relation to the duration of the term of office of the city manager of the capital, which according to said judgment had to be considered as of indefinite duration during the good conduct of the city manager, since it is thus provided by the statute and it was so provided by implication by the Supreme Court when it ordered the reinstatement of petitioner, dated back to January 8, 1939, without any restriction or limitation whatsoever, on the ground that the Board of Commissioners had not shown that the city manager had failed to observe good conduct. By logical deduction, the judgment of the Supreme Court of Puerto Rico must be construed in the sense that the city manager was entitled to be reinstated in his office and to remain in the same during good behavior since this is what

the statute provides and what was raised before the court by counsel for both parties in their briefs and oral arguments.

With the court's leave we most respectfully state that we have examined the cases of *McAuliffe* v. *Coughlin,* 105 Cal. 268, and *Rowe* v. *Blake,* 112 Cal. 637, and have failed to find that these cases are strictly applicable to the case at bar since they deal with the correction of clerical errors, and there is no doubt whatsoever that any court, at any time, has the inherent power to correct such errors.

The question raised by this party is not to deny the court its right to correct its orders and proceedings but the right to fundamentally amend a judgment, limiting or amplifying it in an essential part which affects the rights of one of the parties, acknowledged by the amended judgment, that is, the unlimited and unrestricted right of taking possession of the office from which he had been removed.

We cite immediately following numerous comments and judicial decisions strictly applicable to the case now before this Honorable Court.

See Cal. Jur., volume 14, pages 938, 991, 999, 1008 and 1018.

> "Clerical misprisions can be corrected at any time by an order of the court but judicial errors can be remedied only through a motion for a new trial or by appeal."
>
> *O'Brien* v. *O'Brien,* 124 Cal. 422.

The same doctrine had been upheld in the case of *First National Bank* v. *Dusy,* 110 Cal. 69, wherein, iting the case of *Kamp,* 59 New York 212, the following was said:

> "The jurisdiction of the court over the subject matter of the action and over the parties terminated with the entry of final judgment except to enforce the judgment and carry out its provisions."

The following cases hold that a judgment cannot be changed in any essential particular which affects the parties:

McConville v. *Sup. Ct.*, 78 Cal. App. 203, 248 Pac. 553;
Los Angeles v. *Sup. Ct.*, 94 Cal. App. 433, 271 Pac. 363;
Calkins v. *Monroe*, 17 Cal. App. 324, 119 Pac. 680.

It has been held that if a court has not rendered a judgment which it could have rendered it has no authority to remedy such error by ordering the entry of a judgment *nunc pro tunc*. *Schroeder* v. *Sup. Ct.*, 73 Cal. App. 687, 239 Pac. 65.

When a court loses its jurisdiction it cannot make any amendment.

United Railroad Co. v. *Court*, 170 Cal. 755;
Crenshaw Bros. v. *Southern Pac.*, 42 Cal. App. 44, 123 Pac. 208, 250 U.S. 669, 63 L. ed. 1198, Cert. denied.

It has been also held that a judicial decision rendered on appeal binds the lower court as well as the Supreme Court. *Re Estate of Baird*, 198 Cal. 490.

It has been held that the Code of Civil Procedure of California only contemplates a final judgment in an action and it should not be presumed that the court has adjudged a case through successive final judgments. *Los Angeles Auto Tractor Co.* v. *Sup. Ct.*, 94 Cal. App. 433, 271 Pac. 393.

The power to amend a judgment ceases as soon as the judgment becomes final. *Gillespie* v. *Andrews*, 78 Cal. App. 599, 248 Pac. 715.

The proceedings to amend should not be of a revisory or appellate character. *Stanton* v. *Sup. Ct.*, 202 Cal. 478, 261 Pac. 1001.

The case of *McConville* v. *Sup. Ct.*, 78 Cal. App. 203, 248 Pac. 553, is an example of what constitutes a readjudication of a case when a judgment is amended or altered:

> "A judgment solemnly entered after hearing cannot be annulled except upon legal grounds and following the statute which is the major of the court's jurisdiction." 14 Cal. Jur, 1018; *Molema* v. *Molema*, 103 Cal. App. 79, 283 Pac. 956.
>
> "After entry of final judgment the power to change is gone except as this may be authorized by the rules governing

amendments and the Code provisions for conforming the conclusions and judgments to the findings of fact. Any further judgment or order materially varying the judgment is a nullity, since the court is without jurisdiction." *Bank* v. *Dodson*, 127 Cal. 208; *White* v. *White*, 130 Cal. 597; *Consolidated Construction Co.* v. *Pacific Electric Railway*, 184 Cal. 244

"Proceedings for amendment of judgment should not be permitted to become revisory or appellate in their nature and ought never to be the means of modifying or enlarging the judgment or the judgment record, so that it shall express something which the court did not pronounce even though the proposed amendment embraces matter which clearly could or even should have been pronounced." *Estate of Potter*, 141 Cal. 424; *Leonis* v. *Leffingwell*, 126 Cal. 369; *Tahawa* v. *Hole*, 170 Cal. 323; *Haine Piano Co.* v. *Bloomer*, 193 Cal. 398; *First National Bank* v. *Drug*, 110 Cal. 79; *Mann* v. *Mann*, 6 Cal. App. 610, 92 Pac. 740; *Forrester* v. *Lawler*, 14 Cal. App. 170, 111 Pac. 284.

"Those matters as to which the power of amendment extends are ordinarily described as clerical errors or misprisions as distinguished from judicial errors which are not amendable." *Fay* v. *Stubenrauch*, 141 Cal. 573.

When the instant case was adjudged on June 28, 1940, this court was composed of five judges. Afterwards, two of said magistrates, Mr. Justice Wolf, who delivered the opinion in the case, and Mr. Justice Hutchison, retired from the bench. Although the judgment is the whole court's judgment, the absence of two of the concurring justices, one of them the one who delivered the opinion, who studied the case and submitted its solution to the court, necessarily has to affect the petitioner-appellant.

In view of the foregoing arguments and the judicial decisions cited, we respectfully adduce that the following propositions are logical and consequential:

1. If the duration of the office of city manager and the construction of the phrase "during good conduct", included in section 21 of the statute, were a matter submitted to this court on appeal; then, notwithstanding the absence of any special finding on this issue of law in the judgment, the matter is *res judicata*.

2. The Supreme Court could have made a special finding on said issue but this was not indispensable, since its judgment, in ordering the reinstatement of the city manager, dated back to January 5, 1939, dismissed the charges as a logical consequence and tacitly acknowledged and decided that inasmuch as the city manager observed good conduct he should not have been removed from office.

3. If the construction of section 21 of the statute relative to the duration of the office of city manager was never an issue involved in the action, then we find that the appellate court authorizes the introduction of new matter, beyond the scope of the case, and makes a special finding on a matter which was not the object of the law suit, which constitutes an extralimitation of its faculties as such appellate court. This is equivalent to assuming original jurisdiction, a faculty which the Supreme Court of Puerto Rico does not have in cases such as the one at bar.

4. The error of the appellate court in deciding, correctly or erroneously, according to proposition number one, or in failing to decide, correctly or erroneously, according to proposition number two, would clearly involve a judicial error and not a clerical error of misprision.

The action of the Supreme Court in adjudging the question raised by the respondent-appellee has as its consequence to deny petitioner-appellant of a property right without the due process of law. There was discussed in the lower, as well as in the appellate courts, the question that a public office is not a property right in the technical sense of the word but it is indeed a right protected by the courts and to deprive petitioner of the same the due pro-

cess of law most be observed at all times. The fact that in January, 1942, the court determined that the city manager of the capital ceased as such in February, 1941, has as its consequence to deprive petitioner-appellant from the collection of the fees corresponding to the office during that period which is equivalent to depriving him of a property right which he would enjoy otherwise. If the question relative to the right of the city manager to hold his office during good conduct without any limitation in regard to time was never the object of this action, then the petitioner-appellant is clearly being deprived of his property without the due process of law, since the court has decided in a summary proceeding a question of fact which was not submitted to it without furnishing the petitioner with ample opportunity to be heard in court, to offer evidence and to have his case adjudged in accordance with the norms established by the Organic Act of Puerto Rico on due process of law and the right of every citizen to have his day in court.

If the question was never submitted to the Supreme Court, we respectfully hold that this court had no authority to apply the precepts of the Law of Evidence, section 398 of the Code of Civil Procedure of 1933 (Sec. 36, Law of Evidence of Puerto Rico), since the evidence must conform to the allegation and questions submitted by the parties.

The fact of admitting evidence, of judicial notice, means that the court reopens the case concerning matters of fact without furnishing petitioner-appellant an opportunity to challenge this evidence with other pertinent proof of which he could have availed himself and which this party affirms that exists.

As the adverse party raised new questions of fact, this party, fearfully and entertaining serious doubts as to whether such action lied, submitted two documents to the consideration of the court to refute the evidence of judicial notice which the adverse party sought to have the Supreme Court accept. These two documents are the two bills presented in the Senate of Puerto Rico during two consecutive years to fix the term of four years to the office of

city manager of the capital and to change the title of this office to that of mayor.

It seems also proper to recall that the judgment of June 28, 1940, is no longer a judgment of the Supreme Court of Puerto Rico but a judgment of the United States Circuit Court of Appeals for the First Circuit, which, upon affirming the judgment appealed from, adopted the same in all of its parts and in its full scope, remitting its mandate to the lower court for its execution according to the same. If we add to this that the Supreme Court of the United States refused to issue a writ of certiorari to review the judgment of the Circuit Court, then perhaps it would be even possible to consider the judgment appealed from the appellate court of origin, as a judgment of the Supreme Court of the United States.

> "All inferior courts must yield prompt obedience to the mandate of the Supreme Court of the United States." *Re Howard,* 9 Wall. 175.

In any of the two instances, this Supreme Court lost jurisdiction to alter or amend its judgment in any essential particular which affected the interests of the parties litigant, in accordance with the following decisions of the Supreme Court of the United States. See the case of *Re Sanford Fork & Tool Co.,* 160 U.S. 256, which was subsequently affirmed by the cases of *Smith* v. *Vulcan;* 165 U.S. 518 and *Re Potts,* 166 U.S. 263.

> "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. *Sibbald* v. *United States,* 12 Pet. 488, 492; *Texas & Pacific Railway* v.

Anderson, 149 U.S. 237. If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. *Perkins* v. *Fourniquet,* 14 How. 313, 330; *In re Washington & Georgetown Railroad,* 140 U.S. 91; *City Bank* v. *Hunter,* 152 U.S. 512; *City Bank, petitioner,* 153 U.S. 246.

". . . . . .

"The case is quite different, in this respect, from those in which the whole case, or all but a subsidiary question of accounting, had been brought to and decided by this court upon the appeal, as in the cases principally relied on by the petitioner. *Stewart* v. *Salamon,* 94 U.S. 434, and 97 U.S. 361; *Gaines* v. *Rugg,* 148 U.S. 228; *Ex Parte Dubuque & Pacific Railroad;* 1 Wall. 69; *In re Washington & Georgetown Railroad,* 140 U.S. 91.

"It must be remembered, however, that no question, once considered and decided by this court, can be re-examined at any subsequent stage of the same case. *Clark* v. *Keith,* 106 U.S. 464; *Sibbald* v. *United States,* and *Texas & Pacific Railway* v. *Anderson,* cited at the beginning of this opinion."

In addition to all the decisions which we have cited from California and the Supreme Court of the United States, in our own jurisdiction the matter referring to amendments to a duly entered judgment has been the object of decision by this Honorable Court. We refer to the case of *Marvin & Jones, Inc.,* v. *Torres et al.,* 19 P.R.R. 46. This Honorable Court categorically held that although every court has the right to rectify a clerical error at any stage of the proceedings, to correct an involuntarily omission or to conform the judgment to what appears from the record, it could not nor did it have authority to amend fundamentally a duly entered judgment rendered in a preceding term.

We respectfully contend that the above cited case is absolutely and strictly applicable to the question raised by this party con-

cerning the lack of jurisdiction on the part of the Supreme Court of Puerto Rico to amend fundamentally, in January, 1942, a judgment rendered on June 28, 1940, and it has not been shown that there exists cause, in the case at bar, to disregard those judicial decisions which follow the doctrine universally accepted by the courts of the United States.

CONTENTION NUMBER III.

We respectfully call the attention of the court to the fact that the case of *Shurtleff* v. *United States, supra,* has been given an unwarranted scope and has been wrongly cited as strictly applicable to the case at bar. The case of *Shurtleff* had only to do with the appointment of a general appraiser of merchandise under an Act of Congress which failed to provide the duration of the tenure of office. The Supreme Court of the United States held, by way of commentary, that to accept that Shurtleff had the right to hold the office during his life unless the President should prefer against him one of the charges provided by law, would be equivalent to making said office one for life, in the same level with the judicial officers created by the Constitution when the statute clearly did not provide that such had been the intention of Congress. The Supreme Court did not state that Congress had no authority to say so but that it had not expressly stated it. Now then, the Constitution of the United States, in dealing with judicial officers, does not provide a life tenure for them. It simply provides that the Justices of the Supreme Court and lower courts shall hold their offices during good behavior. It has been by judicial construction that the Supreme Court of the United States itself has established that the phrase "during good behavior" means that the tenure of the office is for life unless a removal takes place for improper conduct. See the case of *In re Hennen,* 13 Peters (38 U.S.) 230, 10 L. Ed. 138. This case was cited both by this party and the adverse party and accepted by the latter as it may be seen from the citation from its brief which we have already quoted:

"Article III.—Section 1. The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

This court had ample opportunity to consider at length all the judicial decisions relating to appointments and to the power of removal in cases where the statute did not determine the duration of the office as well as in cases where the statute expressly established said term. We refer to the extensive opinion delivered by Mr. Justice Hutchison in the case of *Jimenez* v. *Reily*, 30 P.R.R. 582. In that case the Supreme Court cited with approval the case of *Territory* v. *Mann*, 114 Pac. 362, wherein the judgments rendered by the Supreme Court of the United States in the cases of *McAllister, Parsons* and *Shurtleff* are considered.

In conclusion, we wish to call the attention of the court to the fact that the statute which creates the special government for the capital of Puerto Rico in its section 21, cannot be the object of any construction that is not derived from its own text since it is a well known rule of construction that when the text of the law is clear there is no need for searching in other parts of the statute for matters to clarify by interpretation that which is clear and evident of itself and has been the object of judicial interpretation in other cases.

Section 388 of the Code of Civil Procedure of 1933 (section 26, Law of Evidence) provides that in the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

"There should be no construction of a statute where the

language is clear and comprehensive." *U. S.* v. *Wiltberger*, 5 Wheat. 76.

"A statute must be held to mean what the language imports. When it is clear and imperative, reasoning *ab inconvenienti* is of no avail, and there is no room for construction." *Boudinot* v. *U.S.*, 11 Wall. 616.

"Where the language of a statute is transparent and its meaning clear, there is no room for the office of construction: there should be no construction where there is nothing to construe." *Lewis* v. *U. S.*, 92 U.S. 618.

"The court is bound by plain and unambiguous language of a statute, and cannot alter the terms and thus enact instead of construe the law." *U. S.* v. *Ewing*, 184 U.S. 142.

Section 21 of Act No. 99 of 1931 is clear and conclusive. There is no room for construction.

It is possible that the sections relative to the appointment and term of office of other officers and employees of the Government of the capital are not completely clear, although we are of the opinion that if the terms of the officers are not fixed by the statute they should be construed as offices to be held at the will of the appointing power, in harmony with the run of decisions. (*Jiminez* v. *Reily*, 30 P.R.R. 582). But even so, said sections bear no relation whatsoever to section 21 and consequently, they should not be construed with the purpose of determining the legislative intent, which appears to be clear and transparent with respect to section 21.

The mission of the courts, as stated by us in our motion in opposition to the petition of the adverse party, is not to establish the legislative policy of a State but merely to enforce the statutes approved by the legislative authority. This is in harmony with the fundamental principles of our Constitutional Law which uphold the absolute independence of the executive, legislative and judicial powers. From time immemorial in the historic sequence of our Constitutional law, this principle has been firmly and invariably upheld.

"The judicial power is exercised in the decision of cases; the legislative in making general regulations by the enactment of laws. The latter acts from considerations of public policy, the former by the pleadings and evidence of the case." *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 59 U.S. 435.

For the foregoing reasons we pray this court to annul and vacate its judgment of January 14, 1942, and to remit the mandate to the lower court as ordered by the United States Circuit Court of Appeals for the First Circuit, for the fulfillment of the judgment of June 28, 1940, in accordance with the terms expounded in the same.

San Juan, Puerto Rico, January 29, 1942.

RAFAEL RIVERA ZAYAS,
DAMIAN MONSERRAT, JR.,
GABRIEL DE LA HABA,
Counsel for Petitioner-Appellant.

Copy of this motion for reconsideration received on this the twenty-ninth day of January, 1942.

F. FERNANDEZ CUYAR,
Counsel for Respondent-Appellee.

[Same title.]

ORDER.

San Juan, Puerto Rico, January 31, 1942.

[By the Court, at the proposal of Mr. Justice De Jesus.]

The foregoing motion for reconsideration is hereby denied.

It was so ordered by the court as witness the signature of the chief justice. Mr. Justice Todd, Jr. took no part in this ruling.

EMILIO DEL TORO,
Chief Justice.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[Same title.]

NOTICE OF APPEAL.

[Received 1942, April 13, P.M. 3:31 Supreme Court of Puerto Rico.]

To the Clerk of the Supreme Court of Puerto Rico:

Carlos M. de Castro, feeling aggrieved by the judgment rendered and entered in the above cause in the Supreme Court of Puerto Rico on the fourteenth day of January, 1942, does hereby appeal from the entirety of said judgment to the United States Circuit Court of Appeals for the First Circuit.

This appeal is taken in accordance with Rules 10, 14 and 22 of the Rules of Civil Appeals promulgated by the United States Circuit Court of Appeals for the First Circuit, effective September 20, 1940.

Appellant files a cost bond in the sum of two hundred and fifty dollars ($250) and prays that the court approve the same and issue a citation directed to the appellee as provided by law.

San Juan, Puerto Rico, April 13, 1942.

GABRIEL DE LA HABA,
RAFAEL RIVERA ZAYAS,
DAMIAN MONSERRAT, JR.,
by GABRIEL DE LA HABA,
Attorneys for Appellant.

Copy of this notice of appeal received this thirteenth day of April, 1942.

F. FERNANDEZ CUYAR,
Attorneys for Appellee.

[MEMORANDUM: Cost bond in the sum of $250, American Surety Company of New York, surety, filed April 13, 1942, is here omitted. A. I. CHARRON, *Clerk*.]

[Same title.]

DESIGNATION BY APPELLANT OF PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD OF APPEAL.

[Filed April 13, 1942.]

Now comes the appellant through his undersigned attorneys and respectfully sets forth:

That on January 13, 1942, the appellant filed his notice of appeal and in order to perfect his appeal the appellant requests of the clerk of the court to include the complete record and all proceedings and evidence taken in the action upon which this appeal is based, which are the following documents appearing in the record of the above-entitled cause:

1. Judgment and opinion of Supreme Court of Puerto Rico of June 28, 1940.
2. Motion of appellee Board of Commissioners of San Juan of October 27, 1941, requesting arrest of judgment.
3. Motion of appellant of November 4, 1941, in opposition to petition of appellee.
4. Motion of appellant of December 1, 1941, of additional grounds for opposition to the petition of the appellee.
5. Certified copies of the secretary of the Senate of Puerto Rico of the two bills presented before the Senate in the years 1936 and 1937 fixing the duration of the term of office of the city manager of San Juan, filed December 9, 1941.
6. Judgment and opinion of the Supreme Court of Puerto Rico of January 14, 1942.
7. Motion to reconsider filed by the appellant on January 29, 1942.
8. Order of the Supreme Court of Puerto Rico of January 31, 1942, denying motion to reconsider.
9. Notice of appeal dated April 13, 1942.
10. Cost bond.

11. Order of the Supreme Court of Puerto Rico allowing appeal.

12. Order of Supreme Court of Puerto Rico approving cost bond.

13. Citation on appeal directed to the appellee Board of Commissioners of San Juan.

14. Designation of proceedings to be contained in the record of appeal.

Wherefore, appellant prays that the record requested be promptly filed within sixty days from the date of the notice of appeal, by the clerk of this court, with the clerk of the United States Circuit Court of Appeals for the First Circuit, all in accordance with Rules 14 and 22 of the Revised Rules of said appellate court.

San Juan, Puerto Rico, April 13, 1942.

GABRIEL DE LA HABA,
RAFAEL RIVERA ZAYAS,
DAMIAN MONSERRAT, JR.,
by GABRIEL DE LA HABA,
Attorneys for Appellant.

Service of copy of this designation of record received this thirteenth day of April, 1942.

F. FERNANDEZ CUYAR,
Attorneys for Appellee.

[MEMORANDUM: An order of enlargement of time for docketing case to July 12, 1942, is here omitted. A. I. CHARRON, *Clerk.*]

[Same title.]

CERTIFICATE OF TRANSLATION.

I, Luis F. Cuyar, law clerk of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing is a true and faithful translation of the

record, on appeal to the United States Circuit Court of Appeals for the First Circuit, in the case of Carlos M. de Castro, petitioner and appellant, *v.* Board of Commissioners of San Juan, defendant and appellee, Civil No. 8070.

San Juan, Puerto Rico, June 26, 1942.

LUIS F. CUYAR,
Law Clerk of the Supreme Court of Puerto Rico.

[Same title.]

CLERK'S CERTIFICATE.

I, Joaquin Lopez, Secretary-Reporter of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing papers and proceedings had in the above-entitled case are true and faithful copies of their respective originals as the same appear on file and of record in this office;

I further certify that the translation of said papers and proceedings has been revised by Luis F. Cuyar, law clerk of this court, as shown by his certificate attached and made a part of this transcript.

In testimony whereof, I have hereunto set my hand and affixed the seal of this court, after duly cancelling the amount of $38.60 in Internal Revenue stamps, in the City of San Juan, Puerto Rico, this twenty-ninth day of June, 1942.

JOAQUIN LOPEZ,
Secretary-Reporter
[SEAL] *Supreme Court of Puerto Rico.*

$38.60 Internal Revenue stamps cancelled.

STATEMENT OF POINTS RELIED UPON.

[Filed September 22, 1942, by leave of Court.]

Now comes the appellant through his undersigned attorneys and respectfully sets forth such points upon which he relied on appeal and intended to be urged in support thereof:

1. That the Supreme Court of Puerto Rico was without jurisdiction to change or amend fundamentally its final judgment of June 28, 1940, and therefore, the final judgment rendered by said court on January 14, 1942, upon which this appeal has been taken is null and void for lack of jurisdiction.

2. That the appellant has been deprived of a property right without due process of law by reason of the final judgment of the Supreme Court of Puerto Rico of January 14, 1942.

3. That the question of the term of office of the appellant decided by the final judgment of the Supreme Court of Puerto Rico on January 14, 1942, upon which this appeal is taken was *res judicata* and had been previously the subject of judicial determination in these same proceedings and by final judgment of the Supreme Court of Puerto Rico of January 28, 1940.

San Juan, Puerto Rico, September 17, 1942.

Respectfully submitted,

HUGH R. FRANCIS,
GABRIEL DE LA HABA,
by GABRIEL DE LA HABA,
Attorneys for Appellant.

[fols. 71-76] Proceedings in Circuit Court of Appeals. On July 17, 1942, the following Statement on Appeal was filed by appellant:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1941.

No. 3796.

CARLOS M. DE CASTRO,
PETITIONER, APPELLANT,

v.

BOARD OF COMMISSIONERS OF SAN JUAN,
RESPONDENT, APPELLEE.

STATEMENT ON APPEAL.

[Filed in Circuit Court of Appeals July 17, 1942.]

INTRODUCTION.

The instant case is an appeal from a final judgment of the Supreme Court of Puerto Rico entered on January 14, 1942, as an incident of the final judgment of the Supreme Court of Puerto Rico of June 28, 1940, decided on appeal by this Circuit Court in the Case of Board of Commissioners of San Juan *v.* Carlos M. de Castro, No. 3643, October Term 1940.

After the case was remanded to the Supreme Court of Puerto Rico upon denial by the Supreme Court of the United States of the writ of certiorari taken by the Board of Commissioners of San Juan against the final judgment of the Circuit Court entered on January 10, 1941, and before the mandate of the Supreme Court of Puerto Rico was sent to the Court of First Instance (District Court of San Juan, Puerto Rico), the appellee Board of Commissioners of San Juan filed a motion to stay execution of the final judgment of the Supreme Court of Puerto Rico of June 28, 1940, on the grounds that the term of office of the appellant

Carlos M. de Castro had terminated on January, 1941 (typewritten transcript of record, pages 18 to 29).

The motion to stay was objected to by the appellant in the Supreme Court of Puerto Rico (typewritten transcript of record, pages 30 to 63).

On January 14, 1942, the Supreme Court of Puerto Rico entered a judgment, and, upon granting the motion of the Board of Commissioners of San Juan, ordered the stay of the execution of the judgment on the grounds that the term of office of the appellant had terminated on the second Monday of February, 1941 (typewritten transcript of record, pages 64 to 83).

The appellant filed on January 29, 1942, an extensive and elaborate motion to reconsider in which a full discussion was made of the grounds upon which the appellant based his contention that the judgment of the Supreme Court of Puerto Rico of January 14, 1942, was erroneous, null and void for lack of jurisdiction and that the same should be vacated and set aside (typewritten transcript of record, pages 84 to 118).

On January 31, 1942, the motion to reconsider was denied by the Supreme Court of Puerto Rico without opinion. No hearing was held by the court below (typewritten transcript of record, page 119).

On April 13, 1942, the appellant filed his notice of appeal and cost bond as well as the designation of the proceedings to be contained in the record of appeal which is the complete record of the incident appealed to this Honorable court (typewritten transcript of record, pages 120 to 127).

Although not appearing in the transcript of record, the appellant hereby states that the Supreme Court of Puerto Rico granted an extension of thirty days to file the record in the Circuit Court of Appeals. The term was thus extended to July 13, 1942.

Although the motion to reconsider filed by the appellant before the Supreme Court of Puerto Rico (record, pages 84 to 118) presents all the points and discussion thereof upon which this appeal is also based, nevertheless, in compliance with Rule 39 of

the revised rules of this court, the appellant files this statement on appeal setting forth briefly the grounds upon which the present appeal is based.

JURISDICTION ON THE BASIS OF AMOUNT IN CONTROVERSY

This court has jurisdiction under Section 128 of the Judicial Code as amended (28 U.S.C.A. Sect. 225) by virtue of which appeals from final judgments of the Supreme Court of Puerto Rico are allowed to the United States Circuit Court of Appeals for the First Circuit in all civil cases wherein the value in controversy, exclusive of interest and costs, exceeds five thousand dollars.

The instant case being an incident post judgment of the same case that was before this Honorable court, Board of Commissioners of San Juan *v.* Carlos M. de Castro, No. 3643, October Term 1940, there is no doubt that the amount in controversy, exclusive of interests and costs, exceeds five thousand dollars. See record on appeal in said case, pages 225 to 230 and the statement on appeal by the Board of Commissioners of San Juan appearing in said record on pages 232 to 237.

The judgment of the Supreme Court of Puerto Rico of January 14, 1942, appealed herein is a final decision upon which an appeal lies to this court under Section 128 of the Judicial Code above cited. See *Brush Electric Co.* v. *San Jose Electric Imp. Co.*, 51 Fed. 557; *Odell* v. *Batterman Co.*, 223 Fed. 292; *Eighth Avenue R. Co.* v. *Hedges*, 262 U. S. 736, 67 Law Ed. 1207.

JURISDICTION UPON THE EXISTENCE OF A SUBSTANTIAL FEDERAL QUESTION.

The jurisdiction of the court is also invoked on the basis that the appellant was deprived of property rights without due process of law, in violation of Section 2 of the Organic Law of Puerto Rico (48 U.S.C.A., Sect. 737) and of the provisions of the Fourteenth Amendment to the Constitution of the United States.

The appellant sustains that the Supreme Court of Puerto Rico was without jurisdiction to fundamentally change its final judg-

ment of June 28, 1940, by the judgment rendered on January 14, 1942, and that this amendment of its former judgment is equivalent to depriving the appellant of a property right without due process of law in as much as the appellant did not have a full and complete opportunity in a proper judicial proceeding to present his case supported by evidence on the question of the interpretation of Section 21 of Law Number 99 of May 15, 1931 (Laws of Puerto Rico 1931, p. 626). The Supreme Court of Puerto Rico based its decision on the question of the interpretation of the legislative intent with regards to said article 21 applying to that end provisions of the Law of Evidence of Puerto Rico Regarding Judicial Notice (Section 36, Law of Evidence, Section 398, Code of Civil Procedure of Puerto Rico 1933) which the appellant was unable to controvert due to the fact that said proceedings before the lower court were not opened to the introduction of evidence, and it was improper to so allow the introduction of evidence as the Supreme Court of Puerto Rico is not a court of first instance in which the parties can present evidence in support of their contentions or in opposition to the contentions of the adverse party.

The appellant in the court below called the attention of the Supreme Court to the fact that it lacked jurisdiction to stay execution of its judgment (typewritten transcript of record, page 34). The Supreme Court took cognizance of this fact (record, page 67) but decided that the petitioner had not alleged any legal ground to uphold his contention (record, page 67).

Again in his motion to reconsider the appellant presented the question of lack of jurisdiction (record, pages 85 and 86) and argued the same extensively as appears from his motion to reconsider, the grounds of which we wish to reproduce as part of this statement on appeal.

It seems clear that as the Supreme Court of Puerto Rico did not have jurisdiction to amend fundamentally its final judgment of June 28, 1940, under the mistaken concept of authority to amend clerical errors or misprisions, that the appellant, who had

the right to be reinstated in his office of city manager of San Juan, was deprived of a valuable property right, to wit: the possession and tenure of said office from and after the second Monday of February, 1941, until the day of reinstatement and the deprivation of this right constitutes an infringement of the due process clause of the Constitution of the United States and of Section 2 of the Organic Law of Puerto Rico which is a law of the Congress of the United States.

THE JUDGMENT APPEALED FROM IS INESCAPABLY WRONG OR PATENTLY ERRONEOUS.

A full and complete discussion of the merits of this contention with citations of law and authorities is contained in the motion of the appellant before the Supreme Court of Puerto Rico requesting reconsideration (record, pages 84 to 118).

The appellant can add nothing to the contentions presented before the Supreme Court of Puerto Rico by said motion to reconsider and he hereby reproduces this motion as an essential part of his statement on appeal, respectfully requesting this Honorable court to examine the motion to reconsider which clearly states the appellant's contentions.

Notwithstanding what is stated above, the appellant brings before the attention of this court the fact that in Puerto Rico, the Supreme Court of this Island specifically accepted the almost unanimous view of the authorities on the point that all courts have an inherent right to correct a clerical error or misprision at any stage of the proceedings but that they cannot, and have no jurisdiction or authority, to amend fundamentally a duly entered judgment rendered in a preceding term. This was categorically accepted by the Supreme Court of Puerto Rico in *Marvin & Jones, Inc.* v. *Torres et al.*, 19 P.R.R. 46. Notwithstanding this settled point of law, the court below, without any reason, departs from its established ruling, and in the case at bar renders a judgment which materially amends a judgment rendered over one and one half (1 1/2) years before and had been the object of an appeal

to this Honorable court and of certiorari proceedings before the Supreme Court of the United States.

That in the interpretation of Section 7, Subdivision 8 of the Code of Civil Procedure of Puerto Rico, equivalent to Section 128, Subdivision 8 of the Code of Civil Procedure of California, the Supreme Court of Puerto Rico was inescapably wrong or patently erroneous is apparent from a reading of the allegations and authorities cited by the appellant in his motion to reconsider (typewritten transcript of record, pages 97 to 104).

The appellant also contends that the Supreme Court of Puerto Rico was inescapably wrong or patently erroneous in its interpretation of the contention of the appellant that the matter presented by the Board of Commissioners of San Juan requesting stay of proceedings on execution was *res judicata.* The court below misconstrued the reasoning and extent of the case of *Shurtleff* v. *United States*, 189 U. S. 311 and as a consequence, thereof, rendered an erroneous decision by reason of the amendment of its former judgment, by which decision new matter was incorporated which had already been the object of judicial scrutiny or could have been the object of a full and complete judicial determination. This question is fully discussed, and authorities cited by the appellant in his motion to reconsider (typewritten transcript of record, pages 89 to 96).

Respectfully submitted, this second day of July, 1942, at San Juan, Puerto Rico.

RAFAEL RIVERA ZAYAS,
GABRIEL DE LA HABA,
DAMIAN MONSERRAT JR.,
by GABRIEL DE LA HABA,
Counsel for Appellant.

[fol. 77] ACKNOWLEDGMENT OF SERVICE

The undersigned as counsel for appellee Board of Commissioners of San Juan acknowledge receipt of a copy of the transcript of the record before the Supreme Court of Puerto Rico in the above-entitled matter consisting of 129 typewritten pages certified by the clerk of the Supreme Court of Puerto Rico.

Appellee's counsel also acknowledge receipt of three (3) copies of the typewritten statement on appeal filed by the appellant on this date.

San Juan, Puerto Rico, July 2, 1942.

F. Fernandez Cuyar, H. Gonzalez Blanes, by Carlos R. Davila, Counsel for Appellee.

Thereafter, to wit, on July 20, 1942, the following motion to dismiss or affirm was filed by appellee:

MOTION IN THE ALTERNATIVE TO DISMISS THE APPEAL OR TO AFFIRM THE JUDGMENT—Filed July 20, 1942

Comes now the Board of Commissioners of San Juan, appellee in these proceedings, through its undersigned attorneys, and respectfully moves this Court to dismiss the appeal taken herein, or, in the alternative, to affirm the judgment appealed from, inasmuch as it is manifest from the record and from the statement on appeal, filed herein, that the said judgment is neither inescapably wrong not patently erroneous, and, consequently should not be disturbed by this Court. Rule 39, Revised Rules, effective September 20, 1940.

[fol. 78] There is no Jurisdiction on the Basis of the Existence of a Federal Question

The Supreme Court of Puerto Rico through its judgment has construed Section 21 of Law No. 99 of May 15, 1931 (Laws of Puerto Rico, 1931, p. 626) as meaning that the term of office of the City Manager of San Juan is four years only, and that the occupant of such office has no right to hold it during life, as was contended for by appellant herein.

No federal statute, no treaty, no constitutional provision is involved in the construction of said Section 21 of the local statute.

Appellant, however, states that he was deprived of a valuable *property* right, to wit, the possession and tenure of office as City Manager of San Juan, and that such deprivation constitutes an infringement of the due process clause of the Constitution of the United States and of Section 2 of the Organic Law of Puerto Rico. This is manifestly an unwarranted contention. Possession and tenure of a civil office are not property rights for the protection of which the due process clause may be invoked. Taylor v. Beckham, 178 U. S. 549, 44 L. Ed. 1187, 1213. Cf. Higginbotham v. Baton Rouge, 306 U. S. 535, 83 L. Ed. 968, 972.

It is respectfully submitted that no federal question is present in this appeal, or even "lurking in the record".

The Resolution Appealed from is Not Erroneous

Appellant repeatedly insists that the judgment originally [fol. 79] rendered in this case has been fundamentally amended. This is obviously a fallacy.

The original, and the only, judgment rendered in this case has not been in any wise amended. Only a petition has been granted to stay the execution of that judgment in so far as it decrees the reinstatement of appellant into the office of City Manager, on the ground that his term expired on February, —, 1941, that is, four years after he was appointed to said office.

All derivative rights under the judgment, however, remain untouched and unaffected. Back salaries are recoverable, for instance.

It would certainly be a perversion of justice, granting that the term of office expired *after* a judgment of reinstatement, to decide that the court which rendered said judgment has no jurisdiction or power to stay the execution of the decree, thereby facilitating the induction into office of a man whose term has already expired.

It is respectfully submitted that the case at bar represents one of the typical instances wherein the controversy is exclusively one of judicial interpretation of a local statute. And it is only appropriate to state that the construction placed by the Insular Supreme Court on Section 21 of the statute, limiting the City Manager's term of office to four

years, is the only interpretation compatible with our democratic form of municipal and insular or territorial government.

[fol. 80] The appeal should be dismissed, or, in the alternative, the resolution and order of the Supreme Court of Puerto Rico should be affirmed.

Respectfully submitted this 9th day of July, 1942.

F. Fernandez Cuyar, H. Gonzalez Blanes, Attorneys for Appellee, by (S.) F. Fernandez Cuyar, Box 59, San Juan, P. R.

Receipt of a copy of the above motion is hereby acknowledged this — day of July, 1942.

Rafael Rivera Zayas, Gabriel de la Haba, Damian Monserrat, Jr., Attorneys for Appellant. By (S.) Gabriel de la Haba.

Thereafter, to wit, on August 3, 1942, the following Order of Court was entered:

ORDER OF COURT—August 3, 1942

It is ordered that appellee's motion to dismiss or affirm under Rule 39 be, and the same hereby is, denied.

By the Court, Arthur I. Charron, *Clerk*.

Thereafter, to wit, on September 22, 1942, the following Statement of Points was filed by leave of Court:

* * * * * * *

[fol. 81] Thereafter, to wit, on May 4, 1943, this cause came on to be heard, and was submitted on briefs by leave of Court to Honorable Calvert Magruder, Honorable John [fol. 82] C. Mahoney and Honorable Peter Woodbury, Circuit Judges.

Thereafter, to wit, on June 14, 1943, the following Opinion of the Court was filed:

[fol. 83] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1942

No. 3796

CARLOS M. DE CASTRO, Petitioner, Appellant,

vs.

BOARD OF COMMISSIONERS OF SAN JUAN, Respondent, Appellee

Appeal from the Supreme Court of Puerto Rico

Before Magruder, Mahoney and Woodbury, JJ.

Hugh R. Francis, Gabriel De La Haba, for Appellant.
F. Fernández Cuyar, for Appellee.

OPINION OF THE COURT—June 14, 1943

MAGRUDER, J. On January 4, 1937, the Board of Commissioners of San Juan (the newly elected members of which took office on that day) appointed Carlos M. de Castro, appellant herein, as city manager of the Capital of Puerto Rico. Pursuant to § 22 of Act No. 99, Laws of Puerto Rico (1931) pp. 638–640, the said Board of Commissioners, after hearing upon charges, removed de Castro from office on April 5, 1939. The District Court of San Juan upheld the Board. On appeal the Supreme Court of Puerto Rico reversed the judgment of the district court and directed appellant's reinstatement. The Supreme Court's judgment which was rendered June 28, 1940, read as follows:

[fol. 84] "For the reasons set forth in the foregoing opinion, the judgment appealed from, which was rendered by the District Court of San Juan on August 21, 1939, is hereby reversed, and in its stead a new one rendered, annulling Ordinances No. 370, of January 5, 1939, and No. 373, of April 5, 1939, which decreed the suspension and removal of the city manager, and in consequence thereof, ordering the reinstatement of the petitioner Carlos M. de Castro in his office of city manager, said reinstatement to date back from January 5, 1939, when the petitioner was suspended from office and pay."

An appeal was duly allowed, and on July 30, 1940, the court below approved a supersedeas bond. This court af-

firmed the judgment of the Supreme Court of Puerto Rico on January 10, 1941. *Board of Commissioners of San Juan* v. *de Castro*, 116 F. (2d) 806. Certiorari was denied on October 13, 1941, 314 U. S. 614.

Shortly after our mandate went down to the Supreme Court of Puerto Rico the Board, on October 27, 1941, filed in that court a motion to stay the execution of its judgment of June 28, 1940 (which we had affirmed) insofar as it ordered the reinstatement of appellant, on the ground that meanwhile appellant's term of office as city manager had expired.

Appellant filed an opposition to this motion, and after a hearing thereon, the Supreme Court of Puerto Rico on January 14, 1942, entered its judgment, from which the present appeal is taken, reading as follows:

"For the reasons set forth in the foregoing opinion, the motion filed by the Board of Commissioners of San Juan on October 27, 1941, is granted, and in consequence thereof the execution of the judgment of this court of June 28, 1940, is stayed insofar as it decrees the reinstatement of petitioner Dr. Carlos M. de Castro in the office of city manager of the capital because the term for which he was appointed expired in February, 1941."

If the court below was correct in its conclusion that appellant's term of office expired at some time subsequent to [fol. 85] its judgment of June 28, 1940, ordering appellant's reinstatement, we think it is manifest that that court had jurisdiction to stay the execution of its judgment insofar as it decreed reinstatement, despite the fact that the said judgment had been affirmed by this court. See Puerto Rican Code of Civil Procedure, § 7, subdivision 8. Appellant urges that the issue as to his tenure of office had become *res judicata* in his favor, because in his brief before the Supreme Court of Puerto Rico at the earlier hearing he had advanced the contention that the city manager holds office during good behavior. But that court in its opinion of June 28, 1940, did not go into the question of the tenure of the office at all, and did not need to, because at that time appellant's four-year term, which the Board claims was the extent of his tenure, had not expired. Certainly, when we affirmed on the previous appeal we had no idea that we were passing on the tenure of the office. We affirmed a judgment holding that appellant had been improperly removed and ordering

his reinstatement. How long appellant should retain his office after reinstatement was quite another question. When the Supreme Court of Puerto Rico, upon remand from us, regained jurisdiction over its judgment of June 28, 1940, a new situation was then presented. It was then inappropriate, if appellant's term of office had meanwhile expired, for the Supreme Court of Puerto Rico to carry into execution its decree of reinstatement.

This brings us to the merits, the question whether under the applicable statute the city manager holds office for a life tenure (during good behavior), or, as contended by the Board, for a definite term of four years coincident with the four-year terms of the members of the Board which appointed him.

Act No. 99 of the insular legislature, approved May 15, 1931, established a special government for the body politic to be known as the "Capital of Puerto Rico". Relevant [fol. 86] portions of this Act, Laws P. R. (1931) p. 626, and of amendatory Act No. 10, Laws P. R. (1937) p. 131, are copied in the footnote.[1]

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[1] Act No. 99:

"Section 9.—The legislative powers conferred by this Act on the Capital shall be exercised by a governmental body which shall be officially known as 'Board of Commissioners of San Juan'. This Board of Commissioners shall be composed of five members, who shall be appointed by the Governor of Porto Rico, with the advice and consent of the Insular Senate, for the following terms:

One Commissioner for a term of one year;
One Commissioner for a term of two years;
One Commissioner for a term of there years;
One Commissioner for a term of four years;
One Commissioner for a term of five years.

"None of the first five commissioners appointed in accordance with this Act shall assume his office until his appointment has been confirmed by the Insular Senate.

"Section 10.—There are also hereby created the offices of City Manager, Treasurer, Director of Public Works, Director of Health and Charities, School Director, Auditor and Secretary of the Capital.

[fol. 87] The legislative powers are conferred upon a governmental body known as the "Board of Commissioners of [fol. 88] San Juan". As originally constituted by § 9 of the Act, this was a continuing body, composed of five commissioners, appointed by the Governor and confirmed by the Senate, with staggered terms, the term of one commissioner expiring each year. Section 50 of the Act, however, provided that at the general elections in 1936 and every four years thereafter the commissioners should be elected by popular vote, the commissioners previously appointed

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"Section 21.—The City Manager shall be the chief executive of the Capital; he shall be appointed by the Board of Commissioners created by this Act and shall hold office during good conduct.

"Section 22.—The City Manager may be removed by the Board of Commissioners, for just cause, upon hearing and an opportunity to defend himself either in person or through attorneys. The following shall be causes for the removal of the City Manager: Any act of his constituting a felony; any act of his constituting a misdemeanor and implying moral turpitude; or carelessness, inexcusable negligence in the performance of his duties, or immoral or incorrect conduct in the exercise thereof.

"Section 26.—The City Manager shall appoint the following officers:

(1) Treasurer of the Capital;
(2) Director of Public Works;
(3) Director of Health and Charities;
(4) School Director;
(5) Secretary of the Capital.

"Section 27.—The Treasurer, the Director of Public Works, the Director of Health and Charities, the School Director, and the Secretary of the Capital may be removed by the City Manager, for just cause, upon hearing and an opportunity to defend themselves either in person or through attorneys. The following shall be causes for the removal of said officers: Any act of theirs constituting a felony; any act of theirs constituting a misdemeanor and implying moral turpitude; carelessness, or inexcusable ignorance in the performance of their duties, or immoral or incorrect conduct in the exercise thereof.

by the Governor under § 9 to hold office until the first Monday in January, 1937. Act No. 10, approved March 24, 1937, increased the membership of the Board by providing that the Governor should forthwith appoint, with the advice and counsel of the Senate, four additional commissioners to serve with the five commissioners who had been elected in 1936. For the future it was provided that the nine members of the Board should take office on the second Monday in February following each general election, which seems to imply that the four appointed commissioners are

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"Section 36.—The Auditor of the Capital shall be appointed by the Board of Commissioners. This official may be removed by the Board of Commissioners for just cause, after a hearing and an opportunity to defend himself either personally or by attorneys. Causes for removal of this official shall be any act performed by him which constitutes a felony; any act performed by him which constitutes a misdemeanor and implies moral turpitude; carelessness or inexcusable negligence, or immoral and incorrect conduct, in the discharge of his office.

"• • •

"Section 39.—All appointments of employees shall be made by the respective officers, according to the department of the Capital in which they render services. Said employees shall be appointed for the term for which each officer is appointed. The employees of the Capital may be removed for just cause by the officer appointing them, after a hearing and an opportunity to defend themselves. Any employee may be suspended from office and salary upon the preferment of charges against him by the corresponding official.

"Section 50.—The Board of Commissioners created by this Act shall be elected by popular vote at the general elections to be held in 1936, and every four years thereafter. The Commissioners appointed by the Governor of Porto Rico in accordance with section 9 of this Act shall hold office until the first Monday in January of 1937."

Amendatory Act No. 10:

"Section 1.—Section 50 of Act No. 99, entitled 'An Act to establish a special government for the Capital of Puerto

to hold office for four years, as in the case of those elected by popular vote.

Section 10 creates the offices of city manager, treasurer, director of public works, director of health and charities; school director, auditor and secretary of the Capital.

[fol. 89] Section 21 provides that the city manager shall be the chief executive of the Capital; "he shall be appointed by the Board of Commissioners created by this Act *and shall hold office during good conduct.*" [Italics ours.] Procedure for removal of the city manager by the Board "for just cause" after hearing is set forth in § 22.

Section 26 provides that the city manager shall appoint the various departmental heads previously mentioned, except the auditor. No specific provision is made as to the tenure of these officers so appointed by the city manager, but § 27 provides that they may be removed by the city manager, for just cause after hearing, the removal provisions being the same as those empowering the Board to remove the city manager.

Section 36 provides that the auditor shall be appointed by the Board of Commissioners. No specific provision is

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Rico, and for other purposes', approved May 15, 1931, as subsequently amended, is hereby amended to read as follows:

"'Section 50.—The Board of Commissioners created by this Act shall be composed of nine members. Five of these nine members shall be elected by the popular vote of the qualified voters of both precincts of San Juan at the general elections to be held in 1940 and each succeeding four years. The other four members shall be appointed by the Governor of Puerto Rico with the advice and consent of the Insular Senate. The nine members of the Board of Commissioners shall take office on the second Monday in February following each general election; *Provided*, That the five members of the Board of Commissioners elected at the general election of 1936 shall continue in office until the end of the terms for which they were elected, and said Board of Commissioners shall be increased in the manner indicated as soon as this Act takes effect. * * *"

"* * *"

made as to the auditor's term of office; but he also may be removed by the Board for just cause after hearing.

It is to be observed that the legislature has dealt in various ways with the tenure of officers and employees of the city government. The commissioners have fixed terms of years. Of the two officers to be appointed by the Board, the city manager "shall hold office during good conduct"; the auditor's tenure is not stated. Nor is any tenure stated for the other offices to which the city manager has the appointing power. "Employees" are appointed for the term of the appointing officer.

Act No. 99 supersedes, so far as concerns the capital city, the Municipal Law of April 28, 1928, Laws, P. R. (1928) p. 334, under which the chief executive was a mayor, elected for a fixed term, though subject to impeachment by the municipal assembly. Appellant contends that the legislature, in providing that the city manager should hold office "during good conduct," evidenced a clear and unambiguous pur- [fol. 90] pose to introduce experimentally in the city of San Juan a new type of city government, under which the chief executive or city manager would hold office during good behavior "without being tied to the whims and uncertainties of partisan politics."

The court below, however, reached the conclusion that "the tenure of office of the city manager of the capital is that of four years, provided that during the same he observe good behavior."

It is difficult for us to see how § 21 could mean anything different in 1937, and thereafter, from what it meant in 1931, when the new form of government was instituted. There is no basis for saying that the first city manager, appointed in 1931, held a four year term, for at that time the tenure of office of the commissioners themselves was not four years, and their terms were staggered so that only one of the five commissioners went out of office each year.

But passing that difficulty, suppose it had been provided from the outset that the whole body of commissioners should be elected by popular vote every four years, as § 50 provided for 1936 and thereafter. It might then be implied that the auditor, whose tenure is not specifically stated, holds office during a four year term, coinciding with that of the commissioners. The only other alternative would

be (1) that the auditor holds office at the pleasure of the Board, which would seem to be contrary to the implication of the further provision that the auditor is removable by the Board for just cause, after notice and hearing,[2] or (2) that the auditor holds office for life, subject to removal for cause. But a life tenure for public officers is the exceptional thing and will not be read into the statute by implication. *Shurtleff* v. *United States*, 189 U. S. 311, 316 (1903). Not-[fol. 91] withstanding the provision that the city manager shall hold office "during good conduct," the court below has read the statute as meaning that the city manager has the same limited tenure as that of the auditor, as to whose tenure the legislature is silent. Under this interpretation the phrase "during good conduct" in § 21 seems to be rendered meaningless and of no significance.

The tenure of federal judges under Article III, § 1 of the Constitution is described as "during good behavior," which means for life, provided they behave themselves. *Cf. Matter of Hennen*, 13 Pet. 230, 258 (1839). Nobody ever supposed that "during good behavior" meant that the judge would hold office during the term of the president who appointed him, provided that he observed good behavior during that time. In *Smith* v. *Bryan*, 100 Va. 199, 203, 40 S. E. 652, 653 (1902), cited by the court below in another connection, it is stated: "An official tenure 'during good behavior' is for life, unless sooner determined for cause. And removal for cause implies a right to be heard, and a trial in one form of procedure or another."

The steps in the reasoning of the court below are as follows:

(1) Life tenure for public officers is the exception; hence should not be read into the statute by implication but only if the intention of the legislature to that effect appears to be so evident as to permit of no doubt. This is an accepted canon of construction, for which the court properly cites *Shurtleff* v. *United States*, 189 U. S. 311 (1903). That case involved the tenure of the office of general appraiser of

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[2] See *People of Puerto Rico ex rel. Luis A. Castro*, P. R. R. —, decided by the Supreme Court of Puerto Rico July 29, 1942.

merchandise. It was provided in the act creating the office that the appraisers should be appointed by the President with the advice and consent of the Senate and might be removed from office at any time by the President for inefficiency, neglect of duty or malfeasance in office. Beyond [fol. 92] that the statute was silent as to the tenure of the office. The court held that Congress had not clearly enough indicated an intention to make the tenure one for life subject only to removal for cause; and therefore that the act should be construed as leaving unrestricted the President's implied power of removal without cause. But the significant thing is that the act there involved did not provide that appraisers should hold office "during good behavior". The court pointed out (p. 316) that "The tenure of the judicial officers of the United States is provided for by the Constitution, but with that exception no civil officer has ever held office by a life tenure since the foundation of the government". How is the life tenure of judicial officers provided for in the Constitution except by the phrase that they shall hold office "during good behavior"? The rule of interpretation laid down in the *Shurtleff* case, where the act in question did not use the phrase "during good behavior", should not be used to create an ambiguity in § 21 of the act now before us, where the legislature describes the tenure simply as "during good conduct".

(2) The court points to the "anomaly" which would result if the city manager were held to have a life tenure, from the fact that the treasurer, the director of public works, etc., might under § 26 be appointed "for a limited term to be fixed by the city manager," while an employee attached to the office of the city manager, "for example, the messenger of his office, by the mere fact of being appointed by the city manager would hold his employment for life unless removed for just cause." Along the same line, the court states that an uncalled for discrimination would be created between the employees appointed by the other officers and the employees appointed by the city manager, "as the former would hold their employments during the tenure of the appointing officer while the term of office of [fol. 93] the employees appointed by the city manager

would be for life."[3] But these "anomalies," if such they be, are relevant only if it is assumed that there is doubt or ambiguity as to the meaning of § 21.

(3) The court invokes the rule of construction that where the legal provision describing a term is uncertain or doubtful, an interpretation will be adopted which limits the term to the shortest time—in this case, "that of four years, which is the one of the majority, at least, of the Board of Commissioners which appointed" the city manager. This, again, assumes some ambiguity in § 21.

(4) The court refers to the rule that in cases of doubt "the practical construction given to a statute by public officials and acted upon by the people" will be regarded as decisive. In this connection the court took judicial notice of the facts that at the general elections held in 1936 and 1940 the various political parties had indicated to the electorate in advance their respective choices for city manager, and that when the newly elected commissioners took office the board proceeded to appoint as city manager the candidate of the successful political party. Appellant objects that the court below ought not to have taken judicial notice of these facts; that he had no opportunity to put in evidence other facts or explanations which would rob the judicially noticed facts of their significance, and thereby he was denied due process of law. But it is clear that an appellate court may take judicial notice of public acts and facts of common knowledge bearing on a doubtful issue of statutory construction. If the court below took judicial notice of some fact that wasn't so, appellant, on appeal to us, by reference to official records or in some other appropriate way, could [fol. 94] bring the true situation to our notice, and we in our turn, taking judicial notice of the relevant facts, could review any error in statutory interpretation committed by the court below as the result of a misapprehension of the facts judicially noticed by it. Appellant, however, has not undertaken to enlighten us on these matters. Indeed, appel-

[3] Whose "life"? Presumably not that of the employee, for the idea in § 39 seems to be that the employee holds office during the tenure of the officer who appointed him. If appellant is correct, the tenure of the city manager is for life unless sooner terminated by his resignation or removal for cause.

lant does not deny the fact, as stated by the court below, that appellant himself was the preannounced choice for city manager of the winning party at the general elections of 1936. And there seems to be no doubt of the further fact, stated by the court below, that when the newly elected commissioners came into office on January 4, 1937, they proceeded at once to appoint appellant as city manager.[4]

[4] In his opposition to the motion of the Board for stay of execution of the judgment insofar as it ordered reinstatement, filed in the court below, appellant, referring to the tenure of his predecessor in the office, said: "The fact remains that Mr. Benitez Castano did not cease in the exercise of his office because a part of the Board of Commissioners was again elected in 1936, but because of his voluntary resignation, effective many months after January, 1937." But we note that in appellant's original petition in the District Court of San Juan, seeking review of the Board's order of removal, appellant recites that he "held the public office of City Manager, appointed therefor by the respondent Board on the 4th of January 1937." In the complaining petition filed before the Board, seeking removal of appellant, it is recited: "The respondent, Carlos M. de Castro is and has been at all times stated in this petition City Manager having been appointed by the Board of Commissioners of the Capital for that office during good conduct, in the month of Janufry 1937, the said Carlos M. de Castro having taken possession of said office on the 4th day of January 1937 temporarily and on the 19th day of March 1937, as proprietor." Appellant's answer, referring to this paragraph in the complaint, states: "He admits that he is City Manager, appointed by the Board of Commissioners of San Juan and has been in the discharge of his present office from the 4th day of January 1937 up to the present time." In the court's opinion in *Rodriguez* v. *de Castro*, 52 P. R. R. 275, 277 (1937), there is quoted a letter written by appellant stating that Mr. Jesús Benítez Castaño "ceased to be City Manager of the Capital on the 19th of March, 1937." It may be surmised from all this that the newly elected board coming into office on January 4, 1937, asserted on that day its power to appoint, and did appoint, appellant as city manager, but that the incumbent, Mr. Benítez Castaño, at first demurred, perhaps making the claim which appellant now makes on this appeal, that the city manager holds office "during good conduct".

[fol. 95] Appellant is no doubt embarrassed by the argument *ad hominem*, namely, that appellant himself obtained the office of city manager upon an assertion of an interpretation of § 21 inconsistent with that which he now maintains. But we know of no principle of "estoppel" which would preclude appellant from taking this inconsistent position in the present proceedings.

The interpretation put upon the Act by the local political parties and by the successive boards of commissioners would be a relevant consideration in determining the construction of the Act, if the Act itself is deemed to be doubtful or ambiguous in meaning.

If we were free to take a wholly independent view of the point at issue we would be inclined to conclude that the meaning of § 21 is clear, and that the court below went beyond the permissible limits of interpretation in reading the clause "and shall hold office during good conduct" as meaning that "the tenure of office of the city manager of the capital is that of four years, provided that during the same he observe good behavior." But in *Bonet* v. *Texas Co.*, 308 U. S. 463, 471 (1940), the court said:

"To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. Nor would it be enough that the Puerto Rican tribunal chose what might seem, on appeal, to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained here even though [fol. 96] we felt that of several possible interpretations that of the Circuit Court of Appeals was the most reasonable one. For to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous."

We are not prepared to say that the judgment now under review is "inescapably wrong." For many years this court has not had much luck in reversing the Supreme Court of Puerto Rico on questions of local law. As we pointed out in *de la Torre* v. *National City Bank*, 110 F. (2d) 976, 983 (1940), "though Congress has given us appellate jurisdiction over the Supreme Court of Puerto Rico in matters of local law where the value in controversy exceeds $5,000, the

exercise of this jurisdiction is so restricted by the canon prescribed by the Supreme Court of the United States that appeals in such cases are likely to be futile and merely to cause needless delay and expense."

It may be pointed out that our function in this class of cases, technically, at least, is different from that of the Supreme Court of the United States upon review of decisions of state courts. There, the Supreme Court has no appellate jurisdiction in matters of state law, and hence it accepts as conclusive the decisions of the state tribunals in matters of local law. But Congress has given us, and the Supreme Court of the United States upon certiorari, appellate jurisdiction over the Supreme Court of Puerto Rico in matters of local law where the jurisdictional amount is involved. It may well be that as a matter of legislative policy we ought not to have this jurisdiction; the present case is a good example, involving as it does a political matter of strictly local concern in San Juan, Puerto Rico. But as the law now stands litigants bring these cases to us as a matter of right, and we have to pass on them. It is a bit humiliating to this court to be obliged to act practically as a rubber stamp, or else to be reversed by the Supreme Court of the United States.

[fol. 97] Incidentally, we have two lines of appellate jurisdiction from Puerto Rico, one from the United States District Court for Puerto Rico and the other from the Supreme Court of Puerto Rico, 28 U. S. C. § 225. Appeals from the District Court may involve questions of local Puerto Rican law; so far as we know, the "inescapably wrong" rule has never been applied in such cases. Suppose, upon such an appeal, we should decide a question of local law which had never been passed upon by the Supreme Court of Puerto Rico, and that subsequently, in other litigation, the same question should come before that court. Would it be "inescapably wrong" if it should refuse to follow our previous ruling on the point? Or is the Supreme Court of Puerto Rico free in such a case to make its own interpretation of the local law, brushing aside an earlier decision of this court, which on the face of 28 U. S. C. § 225 has appellate jurisdiction over it?

We have gone into this case at such length not in any spirit of complaint, because we recognize that the Supreme Court of the United States applies to itself the same self-denying canon which it imposes on us; and it may be a good

thing. But to save future litigants from disappointment and futile expense, we wish to reiterate that our appellate jurisdiction in this class of cases is pretty much of a dead letter.

The judgment of the Supreme Court of Puerto Rico is affirmed, with costs to the appellee.

On the same day, to wit, June 14, 1943, the following Judgment was entered:

JUDGMENT—June 14, 1943

This cause came on to be heard May 4, 1943, upon the transcript of record of the Supreme Court of Puerto Rico, and was submitted on briefs by leave of Court.

Upon consideration whereof, It is now, to wit, June 14, [fol. 98] 1943, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is affirmed, with costs to the appellee.

By the Court.

Roger A. Stinchfield, Chief Deputy Clerk.

Thereafter, to wit, on June 30, 1943, mandate was stayed until further order of Court.

CLERK'S CERTIFICATE

I, Roger A. Stinchfield, Chief Deputy Clerk of the United States Circuit Court of Appeals for the First Circuit, and, during the temporary absence of the clerk, in charge of the affairs of the clerk's office of said court and custodian of its files and records, certify that the foregoing pages numbered 1 to 98, inclusive, contain and are a true copy of the record and all proceedings to and including July 15, 1943, in the cause in said court numbered and entitled, No. 3796, Carlos M. De Castro, Petitioner, Appellant, v. Board of Commissioners of San Juan, Respondent, Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this fifteenth day of July, A. D. 1943.

Roger A. Stinchfield, Chief Deputy Clerk. (Seal.)

[fol. 99] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 28, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.